WRITING SAMPLE

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During my Evidence class that I enrolled in for the Fall 2022 semester, I prepared the attached motion *in limine* to admit expert testimony. Specifically, as Plaintiff's counsel in this simulated fact pattern, I was tasked with moving the Court to admit a highly qualified economist's testimony on hedonic damages. This exercise culminated in oral arguments before Professor Belmont.

IN THE CIRCUIT COURT OF DARROW COUNTY,
NITA CIVIL DIVISION

JESSE MACINTYRE, Plaintiff	)	
	)	Case No. 20 C 1234
v.	)	Hon. C. Elizabeth Belmont
ROSS EASTERFIELD, Defendant.	)	

PLANTIFF'S MOTION *IN LIMINE* SEEKING THE ADMISSION OF THE TESTIMONY OF DR. JANET JONES

The Plaintiff, Jesse Macintyre, by and through the undersigned, respectfully moves *in limine* to admit the testimony of Dr. Janet Jones. That testimony consists of the following:

(1) Dr. Jones describing the "willingness to pay" (WTP) approach to calculating hedonic damages, which explicates two economic models ("consumer safety behavior" and "individual avoidance") to estimate the value of life, and includes Dr. Jones applying the "loss of pleasure of life" (LPL) scale to the facts of the case to quantify how much Plaintiff's ability to enjoy life has been reduced in a dollar amount;

(2) Dr. Jones' interview with Plaintiff, where Plaintiff estimates the amount by which her ability to enjoy life has been reduced;

(3) Dr. Jones' interview with Dr. Freud that considers Plaintiff's estimated reduction of her ability to enjoy life;

This testimony is admissible under Rules 702 and 703 of the Federal Rules of Evidence.

I. The Court Must Find That the Pertinent Admissibility Requirements are Satisfied by a Preponderance of the Evidence.

Rule 702 charges the trial court with the responsibility of acting as the gatekeeper in determining whether expert testimony is both relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), at 2–3; *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (the gatekeeper function applies to *all* expert testimony, not just testimony based on scientific knowledge). This duty requires finding at the outset, pursuant to Rule 104(a), that

the proponent has established the pertinent admissibility requirements by a preponderance of the evidence. *See* FRE 702 Advisory Committee Notes, at 2.

II. Dr. Jones' Testimony on the WTP Approach to Calculating Hedonic Damages is Admissible Under FRE 702 Because it is Relevant and Reliable

Rule 702 delineates the two-part relevance and reliability test set forth by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), at 2–3. The relevance inquiry requires that "the expert's scientific, technical or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). The reliability test asks if: (1) the "witness… is qualified as an expert by knowledge, skill, experience, training, or education"; (2) "the testimony is based on sufficient facts or data"; (3) "the testimony is the product of reliable principles and methods"; and (4) "the expert has reliably applied the principles and methods to the facts of the case." *See* Fed. R. Evid. 702; Fed. R. Evid. 702(b-d).

A. Dr. Jones' Testimony is Relevant Under FRE 702(a) Because Her Specialized Knowledge Will Help the Jury Quantify Hedonic Damages.

The testimony of Dr. Jones quantifies "the extent and measure of any hedonic damages which Plaintiff alleges she has suffered." R. at 3. In evaluating whether an expert's specialized knowledge will help the trier of fact determine a fact in issue, "there is no more certain test… than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding." FRE 702 Advisory Committee Notes, at 1. Here, the jury must attempt to quantify the unquantifiable, including: (1) how to place a value on the ability to enjoy life; and (2) how to measure how much Plaintiff's injuries reduce that value. The untrained layman cannot make these determinations intelligently and to the best degree possible without some objective reference point to guide the inquiry.

While this inquiry would require subjective value judgments if let to the jury's own devices, Dr. Jones' testimony gives the jury a framework for addressing both questions objectively. Her testimony on the WTP approach shows how *society* places a value on human life—an objective measure—and applying the LPL scale to this valuation—based on a mental health professional's clinical judgment—allows the jury to approximate how much Plaintiff's injuries reduce her ability to enjoy life in dollar figures. Because the jury may be unfamiliar with the nature of dysphoria, depression, and anxiety, Dr. Jones' testimony gives the jury a method that takes approximating hedonic damages out of the realm of mere conjecture.

Defense counsel may object that providing a methodology for calculating hedonic damages invades the province of the jury. *See* FRE 704 Advisory Committee Notes, at 1. ("[Rule 702 and 403] afford ample assurances against the admission of opinions which would merely tell the jury what result to reach.") However, giving the jury a method for calculating damages differs from telling the jury what the value of the damages should be. *See* FRE 702 Advisory Committee Notes, at 1. ("It seems wise to… encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference). Ultimately, Dr. Jones will not opine on what she believes the jury should find as to value. R. at 6. Her testimony gives the jury a comparison of higher and lower ratings to consider based on the LPL metric that incorporates Dr. Freud's assessment. *Id.* She also considers adjustments for improved LPL impairment ratings over time. *Id.* The jury thus has discretion in determining whether to use Dr. Jones' method at all, and they have discretion in determining where Plaintiff's damages fall within the higher and lower estimates should they decide to use Dr. Jones methodology.

B. Dr. Jones' Testimony Satisfies All of the Reliability Requirements Under FRE 702.

1. Dr. Jones is Qualified as an Expert Under FRE 702.

Dr. Jones qualifies as an expert by her specialized knowledge in calculating hedonic damages. *See* FRE 702 Advisory Committee Notes, at 1. ("The expert is viewed… as a person qualified by knowledge… or education.") Dr. Jones holds a Ph.D. in economics from the University of Chicago and has published extensively on hedonic damages. *See* CV of Dr. Jones.

2. Dr. Jones Considers Sufficient Facts and Data Under FRE 702(b).

In reaching her conclusions in this case, Dr. Jones relies upon data from her own research and writing on the topic, as well as three studies she did not author. *See* FRE 702 Advisory Committee Notes, at 6. ("The term data is intended to encompass the reliable opinions of other experts.") The facts Dr. Jones relies on includes the interview of Plaintiff and Dr. Freud. Plaintiff describes how much her ability to enjoy life has been reduced, corresponding to Dr. Jones' LPL scale, and Dr. Freud confirms that Plaintiff's assessment accords with her clinical findings concerning the severity of Plaintiff's dysphoria, anxiety, and depression. *See* Fed. R. Evid. 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.") This information is sufficient to support her conclusions.

3. Dr. Jones Applies Reliable Principles and Methods Under FRE 702(c).

Courts have applied the *Daubert* factors to establish the reliability of an economist testifying to the WTP method for calculating hedonic damages. *See Lewis v. Alfa Laval Separation, Inc.*, 128 Ohio App.3d 200 (1998), at 5. The *Daubert* factors include:

> (1) whether the expert's technique or theory can or has been tested—that is, whether the expert's theory can be challenged in some objective sense; (2) whether the technique of theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community.

FRE Advisory Committee Notes, at 2. The court in *Lewis* limited their consideration to *Daubert* factors 2, 3, 4, and 5. 128 Ohio App.3d 200 (1998), at 5; *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, at 1 (the factors *may* extend to non-scientific testimony *where… appropriate*).

Appellate review in *Lewis v. Alfa Laval Separation, Inc.* found that the trial court did not abuse its discretion in admitting the strikingly similar testimony of plaintiff's expert economist using the WTP approach to calculating hedonic damages. 128 Ohio App.3d 200 (1998), at 5. The court held that the testimony arguably supported the scientific validity of his methodology because: his methodology was published in economics literature subject to peer review (speaking to *Daubert* factor 2), he compared his values with variations in credible industry standards and government agency figures, (speaking to *Daubert* factors 3 and 4), and counsel provided evidence that many scholars have accepted the WTP methodology for calculating hedonic damages (speaking to *Daubert* factor 5). *Id.* at 1–3, 5.

Similarly, Dr. Jones' testimony satisfies *Daubert* factor 2 because her numerous publications on hedonic damages are published in economic journals subject to peer review. *See* CV of Dr. Jones. The testimony satisfies factor 4 because her values are based on standard models used by credible government, insurance industry, and think-tank studies. R. at 4–5. The testimony satisfies factor 5 because Dr. Jones' publications in peer reviewed journals, the three studies she did not author, and the standards derived from credible government, insurance industry, and think-tank studies all speak to the methodology's general acceptance in the field of economics. *Id.* Additionally, Dr. Jones' testimony satisfies factor 3 because she gives the jury a high-to-low range of estimations to consider in determining the ultimate dollar figure. R. at 5–6. This margin of error reflects the assumptions her methodology is predicated on, as well as the accuracy of Dr. Freud's assessments. *Id.*

Defense counsel may argue that Dr. Jones' testimony cannot be objectively tested under *Daubert* factor 1. This factor follows from a guiding principle in the natural sciences that a scientific theory must have a falsifiable hypothesis. *See* FRE 702 Advisory Committee Notes, at 5 ("Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability… than others.") However, social scientists do not test their hypotheses against objectively verifiable phenomenon like natural scientists do. This factor is thus inapposite when applied to the social sciences, such as economic models used to show hedonic damages. *See Id.* ("Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise.")

Defense counsel may also argue that the assumptions of Dr. Jones' model renders the methodology unreliable, and that this would therefore also make the testimony more prejudicial than probative under FRE 403. However, "the reliability requirement of *Daubert* should not be used to exclude all evidence of questionable reliability… there must be something that makes the scientific technique particularly overwhelming to laypersons for the court to exclude such evidence." *Lewis*, 128 Ohio App.3d, at 6 (citing *In re Paoli RR. Yard PCB Litigation* 35 F.3d 717, 744 (C.A.3, 1994)). Like *Lewis* where the expert used strikingly similar methodology, there is "arguably nothing in [Dr. Jones'] methodology that makes it particularly overwhelming to laypersons." *Id.* Moreover, Defense counsel remains free to employ traditional methods of attacking evidence, such as "cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" to ensure that the testimony is not unduly prejudicial *Daubert*, 509 U.S. at 596. The trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system. FRE 702 Advisory Committee Notes, at 3.

4. Dr. Jones Reliably Applies Her Methods to the Facts of the Case Under FRE 702(d).

After determining the total value of life, Dr. Jones applies the LPL scale to determine the extent of hedonic damages. R. at 5. Here, Dr. Jones' interviews both Plaintiff and her treating psychiatrist, Dr. Freud. *Id.* at 6. Plaintiff asserts in the interview that her life's pleasure has been reduced by 33%, and Dr. Freud confirms that this estimate is consistent with the severity of Plaintiff's mental ailments. *Id.* Dr. Freud's opinion on Plaintiff's estimation ensures that Dr. Jones' methods are reliably applied to the facts of case. That is, the objective opinion of a mental health professional ensures that the LPL scale accurately reflects Plaintiff's injuries.

Opposing counsel may object that Dr. Jones' conclusions from the interview with Dr. Freud and Plaintiff are based on hearsay and thus inadmissible under FRE 703 because an expert in the field "would [not] reasonably rely on those kinds of facts… in forming an opinion." Fed. R. Evid. 703. Plaintiff concedes that an expert in Dr. Jones' field would only rely on the evaluation of the mental health professional, not an interview with the plaintiff. *See Lewis v. Alfa Laval Separation, Inc.*, 128 Ohio App.3d, at 3. However, Dr. Freud adopts Plaintiff's statements as her own in confirming that a 33% reduction in the quality of life is consistent with her judgment, so the results are the same either way. That is, because an expert economist would reasonably rely on the opinion of a mental health professional in determining the LPL scale, Dr. Freud's hearsay statements need not be admissible for the opinion to be admitted. Fed. R. Evid. 703.

CONCLUSION

WHEREFORE, the Plaintiff respectfully requests that the Court grant its motion *in limine* to admit the testimony of Dr. Janet Jones.

Respectfully submitted,
By: /s/ Andrew Morales

Applicant Details

First Name	**Connor**
Middle Initial	**O**
Last Name	**Sakati**
Citizenship Status	**U. S. Citizen**
Email Address	**cos10@duke.edu**
Address	**Address** Street **910 Constitution Drive** City **Durham** State/Territory **North Carolina** Zip **27705** Country **United States**
Contact Phone Number	**6036895889**

Applicant Education

BA/BS From	**Georgetown University**
Date of BA/BS	**May 2018**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 15, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Alaska Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Nowlin, Michelle
Nowlin@law.duke.edu
919-613-8502
Meyer, Tim
meyer@law.duke.edu
919-613-7014
Roady, Steve
sroady@duke.edu
919-613-7061

References

Reference Contact Information:

Timothy Meyer:
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meyer@law.duke.edu

Michelle Nowlin:
919-613-8502
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Stephen Roady:
919-613-7061
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Connor Sakati
910 Constitution Drive, Apt. 812
Durham, NC 27705

The Honorable Judge James O. Browning
United States District Court, District of New Mexico
Albuquerque, NM 87102

Dear Judge Browning,

I am applying to serve as your clerk for the 2024-25 term. I am a former Teach for America high school teacher, joint degree student at Duke Law School, and United States Army Reserve officer candidate. I aim to leverage my legal training to help shape rural development, natural resources, and energy law and policy. To that end, clerking would help me deepen my understanding of the litigation process while also broadly exposing me to new legal issues.

My experience teaching and volunteering would make me an effective clerk in your chambers. As the only biology, ecology, and geology high school teacher in a rural school district, I managed over one hundred students (and the reams of paper) that came through my door each day while also independently developing a curriculum for each course. Additionally, as a *Guardian Ad Litem*, I made parental custody and social services recommendations for children in abuse, neglect, and dependency court. Moreover, while volunteering in wilderness emergency services, I have learned to operate under pressure.

Throughout graduate school, I focused on developing strong writing skills, learning to conduct scholarly research, and publishing my own work. Thus, I elected to write eight term papers during my second year of law school while also enrolling in writing-intensive seminars at the Sanford School of Public Policy. I even carried a copy of Ross Gruberman's *Point Made* through the Fort Knox mud and thunderstorms during a monthlong field training. These efforts bore fruit; last semester, the Alaska Law Review published my first paper; another is forthcoming as a chapter of an Environmental Law Institute report. Following recommendations from my professors, I have submitted two other papers for publication in law reviews.

Enclosed please find my resume, transcripts, and writing sample; letters of recommendation from Professors Timothy Meyer, Michelle Nowlin, and Stephen Roady will follow. Please contact me at either connor.sakati@duke.edu or 603-689-5889 if you have any questions regarding my application. Additionally, between July 15 and August 16 I am attending an Army field training at Fort Knox; I apologize in advance for any delayed responses during that time.

Thank you very much for your time and your consideration,

Connor Sakati

CONNOR SAKATI
910 Constitution Drive, Apt. 812, Durham NC 27705 | connor.sakati@duke.edu | 603-689-5889

EDUCATION

Duke University School of Law and Sanford School of Public Policy, Durham, NC
Juris Doctor, Master of Public Policy, Certificate in International Development Economics, expected May 2024
GPA: 3.67 (J.D.), 3.87 (M.P.P.)
Journal: Alaska Law Review, *Executive Board*, *Executive Development Editor*
Military: U.S. Army Reserve Officer's Training Corps (*Officer Candidate*, expected commissioning 2024)
Pro Bono: North Carolina Guardian *Ad Litem*, Innocence Project, Prison Water Quality Monitoring Project
Consulting: North Carolina Office of Rural Health (co-authored rural hospital payment reform report)
Leadership: Government and Public Service Society, *President*
Faculty Public Interest Law Committee, *Student Representative*
Law School Dean's Advisory Council, *Member*
Durham Literacy Center, *Board Member*
Publication: *Fishing in the Desert: Modernizing Alaskan Salmon Management to Protect Fisheries and Preserve Fishers' Livelihoods*, 40 Alaska Law Review 137–69 (2023)

Georgetown University School of Foreign Service, Washington, DC
Bachelor of Science in Foreign Service, Minor in French, *magna cum laude*, May 2018
GPA: 3.87
Honors: French, History, and Political Science National Honors Societies
Study Aboard: Science Po Paris Exchange Program, Paris, France, Fall 2016

EXPERIENCE

U.S. Department of Justice, **Environment and Natural Resources Division**, Denver, CO
Law Clerk, May 2023 – Present
Member of a case team litigating environmental enforcement actions involving multiple antipollution statutes. Researched procedural issues for multiparty civil litigation and novel applications of environmental law to internet companies. Additionally, I interned with the Environmental Crimes Section in 2017.

Alaska Attorney General's Office, Anchorage, AK
Law Clerk, May 2022 – July 2022
Assisted with environmental, criminal environmental enforcement, public agency law, and sex crimes cases. Independently researched, drafted, and edited a motion to dismiss, discovery motions, and a response. Presented original legal research during client meetings and recommended legal strategies, including to the Attorney General.

U.S. Department of State, **International Narcotics and Law Enforcement Affairs**, Washington, DC
Graduate Intern, June 2021 – September 2021
Assisted a team designing and implementing judicial reform and rule of law programming. Authored briefings and talking points for officials, including the Deputy Assistant Secretary. Researched Balkan and Central Asian legal reform issues while helping to develop new programming concepts. Volunteered on Afghan evacuation task force.

Teach for America Appalachia (Harlan High School), Harlan, KY
High School Science Teacher, August 2018 – May 2020
One of two state-licensed science teachers in the school district. Independently taught over one hundred students and developed a standards-aligned curriculum for earth science, biology, and anatomy courses. Coached Boys and Girls Cross Country and Track teams, including a state-meet qualifying team.

Federal Bureau of Investigation, **Criminal Division**, Boston, MA
Honors Intern, June 2016 – August 2016
Assigned to a transnational organized crime task force. Supported active investigations by analyzing evidence and multisource intelligence, building presentations, and briefing Intelligence Analysts and Special Agents.

ADDITIONAL INFORMATION

Languages: French (Proficient), German (12 Credits), Turkish (12 Credits).

Activities and Interests: Orange County Technical Rescue Team Member (wilderness search and rescue, swift water rescue, flooding response). Former Ski Patroller. Avid Skier and Hiker.

DUKE UNIVERSITY - Unofficial Transcript

Name: **Connor Ossama Sakati** **6/9/2023**
Student ID: **2610434**

Academic Program History

Program: **Law School**
(*Status: Active in Program*)
Plan: **Law (JD)** *(Primary)*
Subplan:

Beginning of Law School Record

2021 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	110	CIVIL PROCEDURE	4.500	4.0	GRD
LAW	130	CONTRACTS	4.500	3.3	GRD
LAW	160A	LEGAL ANLY/RESEARCH/WRIT	0.000	CR	CNC
LAW	180	TORTS	4.500	4.0	GRD

Term GPA: 3.766 Term Earned: 13.500

Cum GPA: 3.766 Cum Earned: 13.500

2022 Winter Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	857	LAWYERING/EXECUTIVE BRANCH	0.500	CR	CNC
Course Topic:		**Reserved for 1Ls and LLMs**			
LAW	864	LAWYERING: INT'L DEVELOPMENT	0.500	CR	CNC

Term GPA: 0.000 Term Earned: 1.000

Cum GPA: 3.766 Cum Earned: 14.500

2022 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	120	CONSTITUTIONAL LAW	4.500	3.2	GRD
LAW	140	CRIMINAL LAW	4.500	3.3	GRD
LAW	160B	LEGAL ANLY/RESEARCH/WRIT	4.000	3.3	GRD
LAW	170	PROPERTY	4.000	3.7	GRD

Term GPA: 3.367 Term Earned: 17.000

Cum GPA: 3.544 Cum Earned: 31.500

2022 Summer Term 2

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	614	JD PROFESSIONAL DEVELOPMENT	0.000	CR	PFI

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.544 Cum Earned: 31.500

DUKE UNIVERSITY - Unofficial Transcript

Name: **Connor Ossama Sakati** **6/9/2023**
Student ID: **2610434**

2022 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	218	COMPARATIVE LAW	3.000	4.0	GRD
LAW	368	NATURAL RESOURCES LAW	2.000	4.0	GRD
LAW	566	INTERNATL ENVIRONMENTAL LAW	2.000	4.0	GRD
LAW	582	NATIONAL SECURITY LAW	3.000	3.5	GRD
LAW	621	EXTERNSHIP	2.000	CR	CNC
LAW	621S	EXTERNSHIP SEMINAR	1.000	P	PHF
LAW	628	JD LEGAL WRITING	0.000		NOG
Course Topic:		**Track upper-level writing req.**			
LAW	647	US/CANADA MARINE LIFE GOVT RE	3.000	3.7	GRD
MILITSCI	91L	LEADERSHIP LABORATORY: FALL	0.000	P*	PFP
MILITSCI	301	TRNING MGMT/WARFIGHTING FNCTNS	0.000	A+*	GPN

Term GPA: 3.815 Term Earned: 16.000

Cum GPA: 3.625 Cum Earned: 47.500

2023 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	200	ADMINISTRATIVE LAW	3.000	3.8	GRD
LAW	245	EVIDENCE	3.000	3.6	GRD
LAW	320	WATER RESOURCES LAW	2.000	4.3	GRD
LAW	361	INTERNATIONAL TRADE LAW	3.000	3.5	GRD
LAW	422	CRIMINAL TRIAL PRACTICE	3.000	3.9	GRD
LAW	604	AD HOC TUTORIAL (TOPICS)	1.000	CR	CNC
Course Topic:		**Election Law**			
LAW	640	INDEPENDENT RESEARCH	1.000	4.0	GRD
MILITSCI	92L	LEADERSHIP LABORATORY: SPRING	0.000	P*	PFP
MILITSCI	302S	APP LEADERSHIP/SMALL UNIT OPS	0.000	A+*	GPN

Term GPA: 3.800 Term Earned: 16.000

Cum GPA: 3.670 Cum Earned: 63.500

2023 Summer Term 2

Course		Description	Units Earned	Official Grade	Grading Basis
LAW	614	JD PROFESSIONAL DEVELOPMENT	0.000		PFI

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.670 Cum Earned: 63.500

Law School Career Earned

Cum GPA: 3.670 Cum Earned: 63.500

DUKE UNIVERSITY - Unofficial Transcript

Name: **Connor Ossama Sakati** **6/9/2023**
Student ID: **2610434**

Academic Program History

Program: **Public Policy**
(*Status: Active in Program*)
Plan: **Public Policy - Master's** *(Primary)*
Subplan:
Subplan: **International Development Policy** *Concentration*

Beginning of School of Public Policy Record

2020 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
CONTPPS	1	COURSE CONTINUATION	0.000		NOG
PUBPOL	800	CAREER & PROF SKILL DEV	0.000	-	NOG
PUBPOL	803	POLICY ANALYSIS I	3.000	A-	GRD
PUBPOL	811D	MICROECO: POLICY APPL	3.000	A	GRD
PUBPOL	812	STATISTICS FOR POLICY MAKERS	3.000	A	GRD
PUBPOL	820	GLOBALIZATION/GOVERNANCE	3.000	A-	GRD
PUBPOL	890	SPECIAL TOPICS	3.000	A	GRD
Course Topic:		**INTERNATIONAL DEVELOPMENT**			
PUBPOL	890-1	INTRO SPECIAL TOPICS SKILLS	0.000	-	NOG
Course Topic:		**EXCEL FOUNDATIONS**			

Term GPA: 3.880 Term Earned: 15.000

Cum GPA: 3.880 Cum Earned: 15.000

2021 Spring Term

Course		Description	Units Earned	Official Grade	Grading Basis
PUBPOL	764	GOVERNANCE AND DEVELOPMENT	3.000	A	GRD
PUBPOL	778	FISC DECENTRAL/LOCAL GOVT FIN	3.000	A	GRD
PUBPOL	804	POLICY ANALYSIS II	3.000	B+	GRD
PUBPOL	813	QUANTITATIVE EVAL METH	3.000	A+	GRD
PUBPOL	830	SPECIAL TOPICS MODULE	1.500	A	GRD
Course Topic:		**MODERN CONSERVATISM & POLICY**			
PUBPOL	830	SPECIAL TOPICS MODULE	1.500	A	GRD
Course Topic:		**NC POLITICS & POLICY**			

Term GPA: 3.860 Term Earned: 15.000

Cum GPA: 3.870 Cum Earned: 30.000

2021 Summer Term 1

Course		Description	Units Earned	Official Grade	Grading Basis
PUBPOL	802	GRADUATE SUMMER INTERNSHIP	0.000	CR	CNC

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.870 Cum Earned: 30.000

DUKE UNIVERSITY - Unofficial Transcript

Name: **Connor Ossama Sakati** **6/9/2023**
Student ID: **2610434**

2023 Fall Term

Course		Description	Units Earned	Official Grade	Grading Basis
PUBPOL	790	SPECIAL TOPICS IN IDP	0.000		GRD
Course Topic:		**POLITICAL ECONOMY IN SSA & MN**			
PUBPOL	890	SPECIAL TOPICS	0.000		GRD
Course Topic:		**INTERNATIONAL POLITICAL ECO**			

Term GPA: 0.000 Term Earned: 0.000

Cum GPA: 3.870 Cum Earned: 30.000

School of Public Policy Career Earned

Cum GPA: 3.870 Cum Earned: 30.000

Record of: Connor Ossama Sakati
ID:: 828527878

GEORGETOWN UNIVERSITY
OFFICE OF THE UNIVERSITY REGISTRAR
WASHINGTON, D.C. 20057
(202)687-4020

Date of Birth: 12-Oct

Course Level: Undergraduate

High Schools Attended:
ALVIRNE HIGH SCHOOL
HUDSON NH

Degrees Awarded:
B.S. in Foreign Service May 19, 2018
School of Foreign Service
Major: International Politics
Minor: French
Concentration: International Security Studies
Degree GPA: 3.874
Honors: Magna Cum Laude

Transfer Credit:
Advanced Placement

Writing and Culture Seminar	3.00
Advanced French I	3.00
Adv French II: Contemp Cvlztn	3.00
US Political Systems	3.00
School Total:	12.00

Language Proficiency: French, Spring 2015
Entering Program:
School of Foreign Service
B.S. in Foreign Service
Major: International Affairs

Subj	Crs	Title	Crd	Grd	Pts	R
		Fall 2014				
ECON	002	Econ Principles Macro	3.00	A-	11.01	
FREN	151	Adv French Grammar & Writing	3.00	A	12.00	
HIST	007	Intro Early Hist: World I	3.00	A	12.00	
INAF	100	Prosem: Green Politics	3.00	A	12.00	
THEO	001	The Problem of God	3.00	B+	9.99	
		Second Honors				
Subj	**Crs**	**Title**	**Crd**	**Grd**	**Pts**	**R**
		Spring 2015				
ECON	001	Econ Principles Micro	3.00	B+	9.99	
FREN	161	Topics French Oral Proficiency	3.00	A	12.00	
FREN	250	Rdg Txts/Fr-Speak World:Cultur	3.00	A	12.00	
GOVT	060	International Relations	3.00	A-	11.01	
INAF	008	Map of the Modern World	1.00	S	0.00	
PHIL	099	Political & Social Thought	4.00	B+	13.32	
		Dean's List				

----------Continued on Next Column----------

Program Changed to:
Major: International Politics

Subj	Crs	Title	Crd	Grd	Pts	R
		Fall 2015				
ECON	244	International Finance	3.00	A	12.00	
FREN	371	19th Century Best Sellers	3.00	A-	11.01	
GOVT	040	Comparative Political Systems	3.00	A-	11.01	
GOVT	201	Analysis of Political Data I	3.00	A	12.00	
TURK	011	Intensive Beginning Turkish I	6.00	A	24.00	
		Second Honors				
Subj	**Crs**	**Title**	**Crd**	**Grd**	**Pts**	**R**
		Spring 2016				
FREN	294	French for Politics	3.00	A	12.00	
HIST	365	Society/Politics Modern Turkey	3.00	A	12.00	
INAF	366	Extractive Industries &Conflct	3.00	A	12.00	
JCIV	321	Hist of Peace-Making:Mid East	3.00	A-	11.01	
TURK	012	Intensive Beginning Turkish II	6.00	A	24.00	
		First Honors				
Subj	**Crs**	**Title**	**Crd**	**Grd**	**Pts**	**R**
		Fall 2016				
SCIENCES PO-PARIS INST. POL ST						
Histoire de la Construction Europeenne: Entre Crises et Relances			3.00	15,0		
La Geopolitique Depuis la fin de la Guerre Froide			3.00	14,0		
La Mondialisation des Relations Internationales au XXE Siecle			3.00	17,0		
Introduction a L'Ethique			3.00	16,5		
Commercialisation Internationale des Armements			3.00	13,5		
School Total:			15.00			
Subj	**Crs**	**Title**	**Crd**	**Grd**	**Pts**	**R**
		Spring 2017				
GERM	011	Intens Basic German	6.00	A	24.00	
HIST	108	Central Eurasia	3.00	A	12.00	
HIST	371	(In)tolerance in East Europe	3.00	A	12.00	
HIST	460	Imperialism in ME before WWI	3.00	A	12.00	
IPOL	375	Radicalization and Terrorism	3.00	A	12.00	
		First Honors				
Subj	**Crs**	**Title**	**Crd**	**Grd**	**Pts**	**R**
		Fall 2017				
ECON	243	International Trade	3.00	A	12.00	
GERM	032	Intens Interm Germ:Exper Germ	6.00	A	24.00	
GOVT	260	International Security	3.00	A-	11.01	
SOCI	195	Sociology of Terrorism	3.00	A	12.00	

----------Continued on Next Page----------

01-OCT-2019

GEORGETOWN UNIVERSITY · THE REGISTRAR ·

Annamarie Bianco
Associate Vice President and University Registrar

GEORGETOWN UNIVERSITY
EXPLANATION OF GRADING SYSTEM
Effective Fall 1993

Undergraduate Grading System

Grade	Quality Points	Description
A	4.00	Superior
A-	3.67	
B+	3.33	
B	3.00	Good
B-	2.67	
C+	2.33	
C	2.00	Average
C-	1.67	
D+	1.33	
D	1.00	Minimum Passing
F	0.00	Failure
W		Withdrawal
•S		Satisfactory (A,B,C)
•U		Unsatisfactory
AU		Audit
IP		In Progress
NR		Grades not yet reported
N		Incomplete (a temporary grade which must be resolved within a specified time)

FOR GRADUATION: a) Minimum Quality Point Index of 2.0
b) 120 to 142 semester hours, depending on the individual program.

Graduate Grading System

Grade	Quality Points	Description
A	4.00	
A-	3.67	
B+	3.33	
B	3.00	
B-	2.67	
C	2.00	
F	0.00	
I		Incomplete
W		Withdrawal
•S		Satisfactory
•U		Unsatisfactory
AU		Audit
IP		In Progress
NR		Grades not yet reported

No Quality Points are presented on graduate records.

SEMESTER IS 15 WEEKS
*Not included in the quality hours or Q.P.I.
Grades for courses taken in overseas study programs are recorded as given at the host institution.
"CBL": indicator of Community Based Learning component

September 1962 - August 1993
Undergraduate Grading System

A	SUPERIOR	F	FAILURE	AU	AUDIT
B	GOOD	W	WITHDRAWAL	IP	IN PROGRESS
C	AVERAGE	•S	SATISFACTORY (A,B,C)	NR	NO GRADE REPORTED
D	PASSING	U	UNSATISFACTORY		

June 1968 - August 1993
Graduate Grading System

A	EXCELLENT	F	FAILURE	U	UNSATISFACTORY
B+	SUPERIOR	I	INCOMPLETE	AU	AUDIT
B	GOOD	W	WITHDRAWAL	IP	IN PROGRESS
C	FAIR	S	SATISFACTORY	NR	NO GRADE REPORTED

E in column headed "R" indicates course excluded from Earned Hours and GPA
I in column headed "R" indicates course excluded from Earned Hours only

IN COURSES APPLICABLE TO THE DEGREE SOUGHT, QUALITY POINTS ARE ASSIGNED AS FOLLOWS:
A - 4, B - 3, C - 2, D - 1, F - 0

A PLUS SIGN AFTER A GRADE CARRIES AN ADDITIONAL .5 QUALITY POINT PER CREDIT

•CREDITS ADDED IN TOTAL EARNED, NOT IN THE QUALITY HOURS, OR Q.P.I.

NO QUALITY POINTS ARE ASSIGNED TO COURSES TAKEN AS A GRADUATE STUDENT

EXPLANATION OF THE UNDERGRADUATE AND GRADUATE COURSES NUMBERING SYSTEM

COURSE LEVEL	NUMBERS
UNDERGRADUATE ONLY	001 - 199
UPPERCLASS UNDERGRADUATE	200 - 299
UNDERGRADUATE TUTORIALS, READINGS, RESEARCH	300 - 349
UPPERCLASS UNDERGRADUATE & GRADUATE	350 - 499
GRADUATE LECTURES	500 - 699
GRADUATE SEMINARS	700 - 899
GRADUATE RESEARCH, TUTORIALS, READINGS	900 - 999
THESIS RESEARCH	999

Send To : **GEORGETOWN UNIVERSITY**

Record of: Connor Ossama Sakati
ID:: 828527878

GEORGETOWN UNIVERSITY
OFFICE OF THE UNIVERSITY REGISTRAR
WASHINGTON, D.C. 20057
(202)687-4020

First Honors

Subj	Crs	Title	Crd	Grd	Pts	R
Spring 2018						
HIST	161	Middle East II	3.00	A	12.00	
INAF	351	Post 1979 Paksta,Afghan,Iran	3.00	A-	11.01	
STIA	364	Env Security in the Arctic	3.00	A	12.00	
UNXD	355	Environmental Stewardship	1.00	S	0.00	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	10.00	9.00	35.01	3.890
Cumulative	138.00	109.00	422.37	3.874

End of Undergraduate Record

01-OCT-2019

Annamarie Bianco
Associate Vice President and University Registrar

Page 2

GEORGETOWN UNIVERSITY
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GRADUATE LECTURES	500 - 699
GRADUATE SEMINARS	700 - 899
GRADUATE RESEARCH, TUTORIALS, READINGS	900 - 999
THESIS RESEARCH	999

Send To : GEORGETOWN UNIVERSITY

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 28, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Re: Connor Sakati

Dear Judge Browning:

I write to offer my recommendation of Connor Sakati for a clerkship in your chambers. Throughout the current academic year, I have worked closely with Connor in three different settings – a small research tutorial, an independent study, and a faculty advisory committee – that offered me ample opportunity to get to know him, observe his work with others, and evaluate his performance. In each setting, Connor has impressed me (and others) with his intellect, leadership abilities, and the quality of his character. I have tremendous regard for him and offer him my unequivocal support.

Last semester, I supervised Connor in a small, six-student research tutorial in preparation for a binational workshop of government officials and scientists focused on governance and protection of migratory marine species. As part of the tutorial, students conducted extensive independent legal and factual research, produced background reports for workshop participants, served as rapporteurs for the two day workshop, and collaborated on a report summarizing the proceedings and recommendations. Through this work, Connor became quite interested in challenges to bilateral cooperation and governance and is now conducting an independent study to explore comparative approaches in more detail. In addition, Connor serves as a student representative to the Faculty Advisory Committee for Public Interest and Pro Bono (PIPB) at Duke Law School, for which I serve as Faculty Chair.

Connor's intellectual curiosity and maturity were evident from the first meeting of our research tutorial. He volunteered to undertake research into federal environmental laws and fisheries management, engaged actively with experts in the field who came in as guest speakers, asked probative questions, and helped his classmates analyze findings from their own research. He proved adept at researching unfamiliar legal topics quickly and thoroughly and explaining them clearly and succinctly. He also capably distilled their most important aspects and explained them orally and in writing to a non-legal (and indeed, foreign) audience. Remarkably, Connor did this work despite a heavy course load and significant extracurricular commitments to the Alaska Law Journal, the Government and Public Service Society (GPS), and other activities. Connor's skill in managing his time and focusing his energy is quite remarkable.

Connor is able to leverage his intellectual and analytical skills as both a member and a leader of a team. During our research tutorial, all six students worked as a co-author team, setting deadlines and forming team expectations. Connor facilitated many of the conversations, bringing the team to agreement on a work plan and a schedule. He worked with students across disciplines (three members of the tutorial were law students, three were master's students in environmental science policy), helping environmental students understand the law and learning from environmental students about their discipline's methodologies and jargon. He also volunteered to help other students with their research when they fell behind, ensuring the entire project met its deadlines. Connor's leadership skills are evident in his work on the PIPB committee, as well. He serves as an active liaison to the public service-oriented student body, effectively advocating for improvements to the program. More impressive, however, are the times he has challenged proposals from faculty and staff that he believes would undermine the intent and service of the program. Connor raises important questions diplomatically, and his ability to respectfully present his perspective and analysis carries force.

Finally, Connor is a person of strong moral character, committed to public service in both his professional goals and his outside interests. Connor actively seeks to engage his peers in improving access to legal services, regardless of their specific career paths. He currently leads the Government and Public Service Society, one of the largest student organizations at our school. In that capacity, Connor has advocated to and sought out the opinions of the public interest faculty, earnestly working to improve the school's support for public interest students. He has been involved in advocacy to improve LRAP funding, and successfully worked with the Public Interest and Pro Bono efforts to expand access for 2L summer funding and increase public interest programming. He has volunteered with ski patrol search and rescue efforts, and here in his law school home of the Piedmont of North Carolina, he volunteers as an EMT in wilderness search and rescue.

Connor aspires to work for the government, ideally for the Department of Justice. In addition to the contributions he would make to your chambers, a clerkship would provide him with the opportunity to gain firsthand experience with the complexities and nuances of litigation and develop models of effective advocacy. I offer him my strongest recommendation for this clerkship.

Michelle Nowlin - Nowlin@law.duke.edu - 919-613-8502

Please let me know if you have any questions about Connor's qualifications.

With kind regards,

Michelle Benedict Nowlin
Clinical Professor of Law
Co-Director, Environmental Law and Policy Clinic

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 28, 2023

The Honorable James Browning
Pete V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Re: Connor Sakati

Dear Judge Browning:

I write with great enthusiasm to recommend Connor Sakati for a clerkship in your chambers. Connor is one of my favorite students from my almost-15 years of teaching. He is bright and hard-working, but more than that, he is willing to take contrary positions when he thinks he is right, he is able to disagree agreeably, he is persuasive and thoughtful, and he is an all-around delightful person to talk to. He is also one of the most socially aware students I can recall in his personal dealings with others and the most committed to public service. In short, Connor is the student I am most happy to write a letter for this year (or in the last several years, for that matter). He will make an excellent law clerk and lawyer.

I met Connor in August 2022 when he enrolled in my International Environmental Law class. Broadly speaking, the class covers three units: 1) the design and negotiation of international environmental treaties; 2) principles of international environmental law (e.g., rules on environmental impact assessment, the precautionary principle); and 3) discrete issues in international environmental law (e.g., oceans law, ozone depletion, climate change). The class is discussion-based, rather than lecture-based, which means that students do most of the talking. This particular section had only nine students, which meant that each student's participation was critical to making the discussion a success.

Connor was the best student (and received the highest grade) in the class. Connor showed up to each class having thought about the reading and, if I had to guess, having played in his head the devil's advocate to the positions taken in the reading. This preparation meant that Connor was able to critique the material constructively and offer points of view dismissed or not presented in the reading. For example, at several points Connor argued that unilateral environmental measures (such as carbon border adjustments, i.e., carbon tariffs) might be necessary given the lack of adequate progress in multilateral negotiations. In our discussion of biodiversity protection, Connor pointed out that requiring conservation without aligning economic incentives was likely to fail, contrary to a number of his classmates who favored a more top-down regulatory approach that is likely to be difficult to administer in developing countries. A common thread was Connor's unwillingness to simply accept that the multilateral treatymaking process necessarily produced good outcomes. Throughout these discussions, Connor expressed himself thoughtfully and respectfully, especially when he was disagreeing with others. He is the kind of person that will shine both in collaborative settings and when facing off against opposing counsel.

Connor's final paper for the class, on a legal regime for fishing in contested Arctic waters, was equally good. Connor's writing style is easy and accessible, and his analysis of legal problems is sharp. Students submitted both a rough draft and a final draft. I was particularly impressed by Connor's ability to take constructive criticism and use it to make his paper better. Connor's rough draft was the best draft I received, both in the sense of being the most complete and the best written. I gave Connor a number of suggestions, especially on how to write for a non-expert audience and how to refine his proposal to resolve jurisdictional difficulties in Arctic. Connor implemented the suggestions very effectively. I would say that, despite having the best draft to start with, Connor's paper also showed the most improvement from rough to final draft. Connor submitted the paper not only in satisfaction of his course requirement, but he also submitted it as part of an application to be a Salzburg Cutler Fellow, a program that brings together four students interested in international affairs from each of the top 15 law schools in the country. His paper was selected, and Connor attended the program in Washington, D.C., as one of Duke's representatives.

In the spring of 2023, Connor enrolled in my International Trade Law class, which covers both U.S. trade law and the law of the World Trade Organization. Connor received a 3.5 in the class (roughly an A- on Duke's scale) based on a final exam. Connor's performance in class was exactly what I would have expected. He easily mastered a range of legal and economic concepts, and he was especially thoughtful about the tradeoffs involved in applying trade law doctrines (such as economic discrimination or national security exceptions) broadly versus narrowly. He was a regular participant in class discussions and unlike many students in law school classes, his contributions to discussions were not soapbox speeches; rather, they were genuine engagements with what other students had said. To my mind, his approach to class showed a generosity of spirit toward his students, as well as the ability to adapt his thoughts to the flow of a debate.

Finally, I would be remiss if I did not note what a fine person Connor is. I serve as Connor's adviser in the Public Interest Public Service (PIPS) program. In that role, I have had the chance to get to know Connor outside of class and the opportunity to speak to him at length about his career. Connor is as committed to a career in public service as any student I have known, and equally suited to one. The son of a soldier, Connor is pursuing a commission as an officer in the Army Reserve. Doing so is not easy, as it requires him to undertake additional training during law school. Connor will also obtain a master's in public policy during his time

Tim Meyer - meyer@law.duke.edu - 919-613-7014

at Duke, focusing on development economics. His interest in public policy is broad, with a particular interest in environmental issues, so I am not sure exactly what field of law he will practice in. I am confident, though, that whichever direction he goes, he will have a major impact.

If I can be of any further assistance, please do not hesitate to let me know.

Best,

Tim Meyer
Richard Allen/Cravath Distinguished Professor in International Business Law
Co-Director, Center for International and Comparative Law

Policing the Exception: Balancing Government Effectiveness and Liberty through Insurrection Act Reform[1]

By Connor Sakati

"I am pleading to you, as President of the United States, in the interest of humanity, law, and order and because of democracy worldwide, to provide the necessary federal troops within several hours."[2] Seldom does a mayor plead the President of the United States to send the military to his city, as Little Rock Mayor Woodrow Wilson Mann did on September 24, 1957.[3] However, on that day, Mayor Mann faced a mob blocking nine black high school students from attending class at the all-white Little Rock Central High School, openly defying the Supreme Court's ruling in *Brown v. Board of Education*[4] requiring schools to racially integrate.[5] Arkansas Governor Orval Faubus refused to help enforce the law; he too scorned the decision and even ordered nearly three hundred Arkansas National Guard soldiers to help the mob blockade the students from their new school.[6] Faced with the breakdown of order in his city, Mayor Mann realized that only the federal military could enforce federal law and protect the schoolchildren.

President Dwight Eisenhower famously granted Mayor Mann's request, placing the Arkansas National Guard under federal control and deploying soldiers from the United States Army's 101st Airborne Division, bayonets affixed to their rifles,[7] to escort the nine children to

[1] I excerpted this writing sample from a forty-page term paper I wrote for my National Security Law seminar.
[2] Telegram from Woodrow Wilson Mann, Mayor, Little Rock, to Dwight D. Eisenhower, President (Sept. 24, 1957) (on file with the Dwight D. Eisenhower Presidential Library, Museum, and Boyhood Home), https://www.eisenhowerlibrary.gov/sites/default/files/research/online-documents/civil-rights-little-rock/1957-09-24-mann-to-dde.pdf (punctuation and capitalization added) [hereinafter Mann Telegram].
[3] *Id.*
[4] 347 U.S. 483, 495 (1954) (holding that "[s]eparate educational facilities are inherently unequal" and that segregated schools therefore deprived plaintiffs of the equal protection of the law).
[5] Mann Telegram, *supra* note 2; Relman Morin, *AP Was There: Paratroops With Bayonets Escort Little Rock Nine*, ASSOCIATED PRESS (Sept. 24, 2017), https://apnews.com/article/360439e805eb4db180fbfd52a7a0f5bb.
[6] Gerald Jaynes, *Little Rock Nine*, BRITANNICA, https://www.britannica.com/topic/Little-Rock-Nine (last updated May 17, 2023).
[7] Morin, *supra* note 5.

their school and end mob rule.[8] For authority, President Eisenhower relied on a statute, now codified at 10 U.S.C. §§ 251–55[9] and colloquially termed the Insurrection Act, that is an exception to the general rule barring federal military forces from participating in domestic civil law enforcement.[10] The Insurrection Act grants the President the authority to provide "Federal [military] aid for State governments,"[11] use "the militia and armed forces to enforce Federal authority,"[12] and deploy military forces to stop "[i]nterference with State and Federal law."[13] These broad powers endow the President with discretionary authority; only § 251 requires the approval of another government institution, a state government, before its invocation.[14]

Federal troops rarely enforce domestic law in the United States.[15] Deployed to Little Rock, United States Army Lieutenant Damron noted "the astonishment and bewilderment on many faces" as his convoy rolled though the city.[16] Residents who associated the United States Army and the 101st Airborne Division with battles abroad were "mostly stunned by the military presence."[17]

The astonishment of Little Rock's residents is unsurprising. Americans possess "a traditional and strong resistance . . . to any military intrusion into civilian affairs."[18] This

[8] Gregory Frye, *Army Commemorates 1957 Little Rock Deployment*, U.S. ARMY (Sept. 19, 2011), https://www.army.mil/article/4897/army_commemorates_1957_little_rock_deployment.
[9] Mann Telegram, *supra* note 2.
[10] *See* 18 U.S.C. § 1385 (criminalizing any domestic use of the armed forces to enforce the law not otherwise authorized).
[11] 10 U.S.C. § 251.
[12] 10 U.S.C. § 252.
[13] 10 U.S.C. § 253.
[14] *See* 10 U.S.C. §§ 251–55 (granting the President discretionary authority to deploy troops in many domestic circumstances).
[15] *See* Michael Rouland & Christian Fearer, *Calling Forth the Military: A Brief History of the Insurrection Act*, NAT'L DEF. U. PRESS (Nov. 19, 2020), https://ndupress.ndu.edu/Media/News/News-Article-View/Article/2421411/calling-forth-the-military-a-brief-history-of-the-insurrection-act/ (describing the few Insurrection Act invocations in recent history).
[16] Frye, *supra* note 8.
[17] *Id.*
[18] Laird v. Tatum, 408 U.S. 1, 15 (1972).

skepticism "has deep roots in our history," tracing itself to our nation's revolution and finding "early expression, for example, in the Third Amendment's explicit prohibition against quartering soldiers in private homes without consent and in the constitutional provisions for civilian control of the military."[19] The Declaration of Independence protested, in part, King George III's move "to render the Military independent of and superior to the Civil Power."[20]

Nevertheless, some exceptionally rare circumstances, like Little Rock in 1957, require the Insurrection Act's break with tradition and expectations. There, state government had flaunted federal authority, depriving citizens of their rights through the state's own National Guard forces. Who else but federal troops could restore order, protect liberty, and give effect to the words in *Brown*? Similarly, during Reconstruction, the Insurrection Act played a key role in suppressing a militia battling for the Arkansas governorship and subduing a white mob "massacr[ing]" black citizens in Vicksburg.[21] More recently, Presidents have invoked the Act in response to major disturbances and civil unrest like the 1992 Los Angeles Riots.[22]

Here, I omit a section outlining my argument and reform proposals, which draw on international law of armed conflict principles and contemporary German constitutional practice.

[19] *Id.*; *see also* ELIZABETH GOITEIN & JOSEPH NUNN, BRENNAN CTR. FOR JUST., THE INSURRECTION ACT: ITS HISTORY, FLAWS, AND A PROPOSAL FOR REFORM 2–6 (2022) (describing the history of the Posse Comitatus Act).
[20] THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776); *see also* GOITEIN & NUNN, *supra* note 19, at 3.
[21] Maya Wiley, *How Trump Dangerously Turned An Old Law On Its Head—And What Congress Must Do About It*, THE NEW REPUBLIC (May 2, 2022), https://newrepublic.com/article/166263/trump-insurrection-act-lafayette-square-congress-fix.
[22] Rouland & Fearer, *supra* note 15.

I. The General Rule: The Posse Comitatus Constraint

The Constitution permits the federal government and the states to use the military domestically to enforce the law and stem internal violence. Insuring "domestic Tranquility" was, after all, a major goal animating the Constitution's creation.[23] The Calling Forth Clause empowers Congress "to provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions,"[24] while the Suspension Clause permits Congress to suspend habeus corpus when "in Cases of Rebellion or Invasion the public Safety may require it."[25] The states may even "engage in War" when "actually invaded or in such imminent Danger as will not admit of delay."[26] Moreover, under Article IV, the United States must "protect" each state "against domestic Violence" when that state's government demands assistance.[27]

Although the Constitution empowers the President to lead the military, it also empowers Congress to regulate the military's use. Certainly, the President exercises the "executive Power"[28] and serves as the "Commander in Chief of the Army and Navy of the United States, and of the Militia."[29] Moreover, the President possesses the duty to "take Care that the Laws be faithfully executed."[30] However, Article I gives Congress tools to limit this authority, granting Congress the power to "raise and support Armies"[31] and "make Rules for the Government and Regulation of the land and naval Forces."[32] Congressional power only increases during domestic deployments. Although some scholars suggest that the Calling Forth Clause merely permits

[23] *See* U.S. CONST. pmbl. (describing the reasons why delegates created a new Constitution).
[24] *Id.* art. I, § 8, cl. 15.
[25] *Id.* art. I, § 9, cl. 2.
[26] *Id.* art. I, § 10, cl. 3.
[27] *Id.* art. IV, § 4.
[28] *Id.* art. II, § 1, cl. 1.
[29] *Id.* art. II, § 2, c1. 1.
[30] *Id.* art II, § 3.
[31] *Id.* art. I, § 8, cl. 12.
[32] *Id.* art. I, § 8, cl. 14.

Congress to regulate the militia's use, others argue that, when Congress places guardrails on the domestic deployment of federal troops, that clause "resolves in Congress's favor any argument that such statutory limitations unconstitutionally infringe upon the President's constitutional authority as commander in chief."[33]

Congress has exercised this prerogative, creating a statutory framework limiting the President's authority to use the military to enforce the law domestically. The general rule, the Posse Comitatus Act, is that no one may use military forces under federal control to enforce civilian law.[34] The Posse Comitatus Act criminalizes using the armed forces to enforce the law unless the Constitution or another law authorizes their use, commanding that:

> "Whoever, *except in cases and under circumstances expressly authorized by the Constitution or Act of Congress*, willfully uses any part of the Army, the Navy, the Marine Corps, the Air Force, or the Space Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both."[35]

Note that the Coast Guard, due to its unique law enforcement role, is excepted.[36] Although the Posse Comitatus Act is a criminal provision, found within U.S. Code Title 18 alongside most major federal crimes, no prosecutions have ever relied on the statute.[37] Instead, courts have used it as a "guidepost" to constrain executive power.[38] For example, the Eighth Circuit Court of

[33] Stephen I. Vladeck, *The Calling Forth Clause and the Domestic Commander in Chief*, 29 CARDOZO L. REV. 1091, 1094–95 (2008).
[34] 18 U.S.C. § 1385.
[35] *Id.* (emphasis added).
[36] *See id.* (mentioning all other branches of the armed forces but omitting the Coast Guard); *see also* 6 U.S.C. § 468 (describing the Coast Guard's statutory mission, including domestic law enforcement).
[37] *Reference Sheet on the Insurrection Act and Related Authorities*, BROOKINGS INSTITUTION, https://www.brookings.edu/wp-content/uploads/2020/12/ReferenceSheet_InsurrectionActAndRelatedAuthorities.pdf (last accessed May 30, 2023).
[38] Bissonnette v. Haig, 776 F.2d 1384, 1388 (8th Cir. 1985).

Appeals has held that violating the Posse Comitatus Act renders a search or seizure "constitutionally 'unreasonable.'"[39] Despite the Posse Comitatus Act's bigoted origins (it was created to stop federal troops from enforcing voting rights during Reconstruction),[40] Congress has found that it "has served the Nation well in limiting the use of the Armed Forces to enforce the law."[41]

The Posse Comitatus Act does not bar military assistance to law enforcement completely. Rather, the Act only bars assistance involving military personnel that constrains citizens through military power. To constitute a Posse Comitatus violation, military "personnel" must have "subjected the citizens to the exercise of military power which was regulatory, proscriptive, or compulsory in nature, either presently or proscriptively."[42] A "mere threat" does not rise to the level of a violation.[43] Thus, while sharing tools, conducting surveillance, and counselling civilian law enforcement may not violate the Act, "maintained roadblocks" or "armed patrols" will.[44] Yet, when a United States Army Colonel advised federal law enforcement during a standoff by advocating for stricter rules of engagement, urging negotiations, and managing logistics, he could have "appreciably affected" law enforcement operations and therefore may have violated the Act.[45]

Constitutional considerations further qualify the Posse Comitatus rule. Although the Constitution does "not expressly grant [the President] any independent authority to use the armed

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[39] *Id.* at 1389.
[40] Axel Melkonian, *The Posse Comitatus Act: Its Reconstruction Era Roots and Link to Modern Racism*, SYDNEY U. L. SOC'Y (Sept. 2, 2020), https://www.suls.org.au/citations-blog/2020/8/28/the-posse-comitatus-act-its-reconstruction-era-roots-and-link-to-modern-racism.
[41] 6 U.S.C. § 466(a)(3).
[42] Bissonnette v. Haig, 776 F.2d 1384, 1390 (8th Cir. 1985). This test "is based on" language drawn from the Supreme Court's decision in *Laird v. Tatum*, 408 U.S. 1, 9–11 (1972). *Bissonnette*, 776 F.2d at 1390.
[43] *Bissonnette*, 776 F.2d at 1390.
[44] *Id.*
[45] United States v. Jaramillo, 380 F. Supp. 1375, 1377–1381 (D. Neb. 1974). The District Court did not determine whether these acts did, in fact, violate the Posse Comitatus Act. *Id.* at 1380–81.

forces at home,"[46] the Supreme Court has determined that the President does possess some inherent constitutional powers to deploy the military. Indeed, in President Eisenhower's declaration ordering federal troops to Little Rock, he cited to his inherent powers to use troops before citing to the Insurrection Act's statutory grant of authority.[47] Foremost, the Supreme Court has held that the President has both the inherent power and duty to defend the country when attacked.[48] Additionally, while striking down the use of martial law in Indiana during the Civil War, the Supreme Court noted that narrow uses of martial law may be allowed during unrest if, due to violence, the "courts are actually closed, and it is impossible to administer criminal justice according to law."[49] However, martial law may only extend to "the theatre of active military operations."[50] Even Congress agrees that:

> "the Posse Comitatus Act is not a complete barrier to the use of the Armed Forces for a range of domestic purposes, including law enforcement functions, when the use of the Armed Forces . . . is required to fulfill the President's obligations under the Constitution to respond promptly in time of war, insurrection, or other serious emergency."[51]

II. The Insurrection Act: An Exception to Normal Practice

The Insurrection Act, Chapter 13 of United States Code Title 10, is one such "circumstance expressly authorized by . . . Act of Congress" allowing the President to use the military to enforce the law domestically.[52] The Insurrection Act contains three different provisions permitting domestic military deployments in overlapping circumstances.

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[46] GOITEIN & NUNN, *supra* note 19, at 6.
[47] Exec. Order No. 10730, 22 Fed. Reg. 7628 (Sept. 24, 1957).
[48] The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 668 (1862).
[49] *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 127 (1866).
[50] *Id.*
[51] 6 U.S.C. § 466(a)(5).
[52] 18 U.S.C. § 1385; 10 U.S.C. §§ 251–255.

Section 251, entitled "Federal aid for State governments," permits the President to assist a state government under assault, echoing how Constitution Article IV allows the federal government to protect the states against internal violence when they request aid.[53] This section is the least discretionary, only granting power to the President in situations when "there is an insurrection in any State against its government" and after either the "legislature" or "governor" of the impacted state requests aid.[54] When these conditions are both satisfied, the President can federalize "militia," but only in the amount the distressed state requests, and mobilize federal "armed forces" in his discretion.[55] He must use these forces "to suppress the insurrection."[56]

Section 252 provides the President broader, more discretionary powers "to enforce Federal authority," requiring no state government permission to use force.[57] The President must determine two conditions to exist before using the military under this section. First, the President must determine that there exists either "*unlawful* obstructions, combinations, or assemblages" or a "rebellion against the authority of the United States."[58] The plain meaning of unlawful need not incorporate violence or danger; a peaceful assembly could perhaps be unlawful without a valid permit. Second, the President must determine that the unlawful obstruction or rebellion has made it "*impracticable* to enforce the laws of the United States . . . by the *ordinary course* of judicial proceedings."[59] The plain meaning of impracticable implies a more subjective, less onerous

[53] *Compare* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.") *with* 10 U.S.C. § 251 ("Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.").
[54] 10 U.S.C. § 251.
[55] *Id.*
[56] *Id.*
[57] *See* 10 U.S.C. § 252 (omitting any requirement to obtain another institution's permission prior to invocation).
[58] *Id.* (emphasis added).
[59] *Id.* (emphasis added).

burden than impossibility.[60] Additionally, requiring only that the unlawful acts obstruct government's "ordinary course" does not require the President to take additional efforts to enforce the law before using military force. Once the President has determined that these two conditions exist, he may then use any "militia" or "armed forces" that "he considers necessary" to confront the situation, again a discretionary choice.[61]

Section 253 also provides the President broad powers to stop "interference with State and Federal law" by an "insurrection, domestic violence, unlawful combination, or conspiracy." Yet, unlike § 251 and §252, which are both grants of power using the word "may," § 253 directs that the President "shall" take measures by "using the militia or armed forces" or "any other means." Like both preceding sections, § 253 leaves the choice of which forces to use in the President's hands, "as he considers necessary." The President may use military forces under this section in two different situations.[62] First, the President can invoke the section when an insurrection "hinders the execution" of state and federal law, thereby denying citizens a constitutional "right, privilege, immunity, or protection."[63] The local government must also have been "unable, fail[ed], or refuse[d]" to resolve the situation.[64] Second, the President may also invoke § 253 when an insurrection either "opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws."[65]

The two remaining sections of Chapter 13, § 254 and § 255, grant no powers. Instead, § 254 constrains presidential power by requiring that, whenever the President invokes §§ 251, 252,

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[60] *Compare Impossibility*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("A fact or circumstance that cannot occur, exist, or be done.") *with Impracticability*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("For performance to be truly impracticable, the duty must become much more difficult or much more expensive to perform, and this difficulty or expense must have been unanticipated.").
[61] 10 U.S.C. § 252.
[62] 10 U.S.C. § 253.
[63] *Id.*
[64] *Id.*
[65] *Id.*

or 253, he must "immediately" issue a proclamation ordering "the insurgents to disperse and retire peaceably to their abodes within a limited time." This is not an insignificant limitation, for it means the President must give prior, public notice of his intention to use the military and cannot use the military covertly under these authorities. Section 255 is merely definitional, including Guam and the Virgin Islands within the Insurrection Act's scope.

Through the Insurrection Act, Congress grants a high degree of discretion to the President; courts have played little role in reviewing Presidential actions taken under the Act. The Supreme Court, interpreting an earlier, 1795 version of the Act, determined that discretion under the Act "is exclusively vested in the President, and his decision is conclusive upon all other persons."[66] That version employed language broadly similar to the Act's current text, declaring that "it shall be lawful for the President of the United States to call forth such number of the militia . . . *as he may judge necessary* to repel such invasion."[67] The Court found that "[w]henever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."[68]

In reaching this holding, the Court also relied on the President's role as "commander in chief" with the duty to "take care" of the law's execution, asserting that "[h]e is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts."[69] When confronted with the enormous power this holding

[66] Martin v. Mott, 25 U.S. (12 Wheat.) 19, 28 (1827).
[67] *Id.* at 29 (emphasis added).
[68] *Id.* at 31–32.
[69] *Id.* at 31.

granted, the Court responded that it is "no answer that such a power may be abused, for there is no power which is not susceptible of abuse."[70]

However, a later Supreme Court case may have qualified presidential discretion to good faith invocations of the Act. Although the case involved the Governor of Texas, the Court analogized the Governor to the President when reaching its conclusions.[71] The Court admitted that, when an executive deploys the militia, "there is a permitted range of *honest* judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order."[72] When executive decisions are "conceived in *good faith*, in the face of the emergency, and directly related to the quelling of the disorder or the prevention of its continuance," those decisions are within the executive's discretion.[73] However, this argument should not be carried to its extreme, for those acts "unjustified by the exigency or subversive of private right and the jurisdiction of the courts" become "mere executive fiat," and are not within the executive's powers.[74] To stop such overreach, "the allowable limits of military discretion" and whether those limits have been "overstepped" still remain "judicial questions."[75]

The Insurrection Act's invocation may unlock extraordinary constitutional penalties punishing "insurrection or rebellion" against the United States.[76] The Fourteenth Amendment includes a provision barring anyone who has ever sworn to support the Constitution and subsequently "engaged in insurrection or rebellion against the [the United States], or given aid or comfort to the enemies," from holding state or federal office.[77] Yet, that Amendment does not

[70] *Id.* at 32.
[71] Sterling v. Constantin, 287 U.S. 378, 399 (1932).
[72] *Id.* (emphasis added).
[73] *Id.* at 400 (emphasis added).
[74] *Id.*
[75] *Id.* at 400–401.
[76] U.S. CONST. amend. XIV, § 3; JENNIFER ELSEA, CONG. RES. SERV., LSB10569, THE INSURRECTION BAR TO OFFICE: SECTION 3 OF THE FOURTEENTH AMENDMENT 3 (2022).
[77] U.S. CONST. amend. XIV, § 3.

define these disqualifying terms. Under one view, since the Calling Forth Clause grants Congress the power to regulate when forces may be mobilized and deployed to "suppress Insurrection,"[78] and Congress exercises this power through the Insurrection Act, the Insurrection Act's invocation defines when an "insurrection or rebellion" occurs.[79] If correct, a discretionary presidential choice would shape a constitutional punishment's scope.

My paper then discusses the different authorizing statutes under which the National Guard operates and how these authorities interact with the Posse Comitatus Act, as well as other statutory exceptions to the Posse Comitatus constraint. Later, my paper continues by analyzing past Insurrection Act invocations and proposed invocations. Drawing from these examples, I propose new guardrails for the Insurrection Act designed to stop two categories of abuse I identify: bad faith invocations and disproportionate invocations.

[78] *Id.* art. I, § 8, cl. 15.
[79] ELSEA, *supra* note 76, at 3.

Nonpoint Source Pollution as Unreasonable Interference: Reviving Federal Common Law Nuisance to Remedy the Clean Water Act's Deficiencies*

"Below our fields, twisting and winding, ran the clear blue waters of the Illinois River. The banks were cool and shady. The rich bottom land near the river was studded with tall sycamores, birches, and box elders. To a ten-year-old country boy it was the most beautiful place in the whole wide world, and I took advantage of it all."

-Wilson Rawls, *Where the Red Fern Grows*[1]

I. Water Law's Nonpoint Source Pollution Problem

The Illinois River begins at a remote headwaters in Arkansas, meandering westward through mountains and agricultural lands until passing into Oklahoma.[2] Once the river crosses the border, it snakes through the Oklahoma Ozarks where Wilson Rawls set his rural coming-of-age story *Where the Red Fern Grows*.[3] Finally, it empties into Lake Tenkiller, formerly described as "the emerald jewel in Oklahoma's crown of lakes."[4] The lake and river form the foundation for a regional tourist economy based on fishing, wildlife, and recreation.[5] In 1961, the year Wilson Rawls published his novel, the Illinois River and downstream lakes were still as "crystal clear" as they had been during his childhood.[6] But today, in Oklahoma's portion of the watershed, algae blooms cloud the once-blue waters, "hundreds of thousands of tons poultry litter," a noxious mixture of decaying chicken production waste, wash along the riverbanks each year, and fish suffocate beneath the decomposing agricultural waste.[7]

*This writing sample is excerpted from my Water Resources Law final paper; like my other writing sample, I have received no help, feedback, or editing advice from anyone.

[1] WILSON RAWLS, WHERE THE RED FERN GROWS 18 (1961).

[2] Doug Thomson, *Almost 18 years later, Oklahoma wins lawsuit against Arkansas poultry firms over Illinois River pollution*, NW. ARK. DEMOCRAT GAZETTE (Jan. 20, 2023), https://www.nwaonline.com/news/2023/jan/20/almost-18-years-later-nwoklahoma-wins-lawsuit/.

[3] *Id.*

[4] *Tenkiller Lake Recreation*, U.S. ARMY CORPS OF ENGINEERS, https://www.swt.usace.army.mil/Locations/Tulsa-District-Lakes/Oklahoma/Tenkiller-Lake/Tenkiller-Lake-Recreation/ (last accessed Apr. 25, 2023).

[5] *Id.*

[6] Oklahoma *ex rel.* Drummond v. Tyson Foods, 2023 WL 259895 at *1 (N.D. Okla. 2023).

[7] *Id.*

Although water quality regulations have become significantly more stringent over the last six decades, over that same period the Illinois River's pollution problem has worsened.[8] Those regulations do little to manage the pernicious sludge clogging the river, a form of pollution legally categorized as nonpoint source pollution. The federal Clean Water Act, the country's major water quality statute, is largely concerned with pollution from "discernible, confined and discrete conveyance[s]" called point source pollution.[9] Nonpoint source pollution is everything else; the catchall category includes "runoff, precipitation, atmospheric deposition, drainage, seepage . . . hydrologic modification" and the agricultural runoff poisoning the Illinois River.[10] The Clean Water Act largely devolves regulation for nonpoint source pollution to the states.[11] Therefore, although Oklahoma manages its portion of the river under the Oklahoma Scenic Rivers Commission, attempting to protect its own waters,[12] federal law leaves upstream Arkansas free to set looser rules. As a result, upstream poultry producers use the river as a free garbage disposal.

Oklahoma's nonpoint source pollution problem is not unique. Nonpoint source pollution is "the leading remaining cause of water quality problems" in the country.[13] Approximately "half of all water pollution" choking our rivers comes from nonpoint sources, degrading at least "80,000 miles of rivers and streams" and "2.5 million acres of lakes and reservoirs."[14]

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[8] *Id.*
[9] 33 U.S.C. § 1362(14).
[10] *Basic Information about Nonpoint Source (NPS) Pollution*, ENVTL. PROTECTION AGENCY, https://www.epa.gov/nps/basic-information-about-nonpoint-source-nps-pollution (last accessed Apr. 25, 2023).
[11] *See* 33 U.S.C. § 1329 (describing state responsibilities for nonpoint source pollution regulation and federal incentives to adopt best management practices).
[12] *Scenic River Operations*, GRAND RIVER DAM AUTHORITY, https://grda.com/scenic-rivers-operations/ (last accessed Apr. 25, 2023).
[13] Kevin DeGood, *A Call to Action on Combatting Nonpoint Source and Stormwater Pollution*, CTR. FOR AM. PROGRESS (Oct. 27, 2020), https://www.americanprogress.org/article/call-action-combating-nonpoint-source-stormwater-pollution/.
[14] *Id.*

While nonpoint source pollution can take many forms, nutrient and sediment runoff are the most prevalent.[15] However, heavy metals, pesticides, oils, and other chemicals also leach into groundwater and waterways across the country,[16] while land modification and urban runoff worsen water quality, too.[17] All this pollution, harmful intrinsically, causes second- and third-order effects like the algae blooms and fish kills the Illinois River has suffered.[18] While states may disagree on the proper degree of regulation pollution requires, water pollution does not stop at state borders; loosely-regulating states still impair their downstream neighbors' water quality.

II. Oklahoma Takes Action, Reviving Federal Common Law Nuisance

In 2005, to clean up the Illinois River, Oklahoma's Attorney General filed a federal suit against Arkansas poultry producers, including Tyson Foods, alleging legal responsibility for the river's deterioration.[19] Buried among a litany of other alleged violations, Oklahoma asserted that Arkansas poultry pollution constitutes a "Federal Common Law Nuisance," a tort states once utilized to hold each other accountable for transboundary environmental harm.[20]

Federal common law nuisance evolved to fulfill the United States Supreme Court's charge to resolve interstate water disputes. The Supreme Court once placed great importance on providing a forum for states to settle these disputes, reasoning that water issues, if arising "between independent sovereignties, might lead to war."[21] In nuisance cases like the dispute between Oklahoma and Tyson, where the "ecological rights of a state" were harmed "from

[15] *Nonpoint Source Pollution: The Nation's Largest Water Quality Problem*, ENVTL. PROTECTION AGENCY, https://nepis.epa.gov/Exe/ZyPDF.cgi/20004PZG.PDF?Dockey=20004PZG.PDF (last accessed Apr. 25, 2023).
[16] *Id.*
[17] *Id.*
[18] Oklahoma *ex rel*. Drummond v. Tyson Foods, 2023 WL 259895 at *1 (N.D. Okla. 2023).
[19] *Id.* at *92.
[20] *See generally* Robert Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 ALA. L. REV. 717, 719–760 (describing the history of federal common law nuisance before preemption).
[21] Missouri v. Illinois, 200 U.S. 496, 518 (1906).

sources outside the State's own territory," judge-made federal common law governed.[22] States sued each other—or each other's citizens—for unreasonable interference with the public's rights, relying on neutral federal law to enjoin harmful transboundary pollution.[23]

However, many thought the Supreme Court had killed off this federal cause of action four decades ago.[24] With the Clean Water Act's 1972 passage, Congress created a complex water pollution regulatory scheme, introducing new statutory law into a field previously regulated under the federal common law.[25] Because the Clean Water Act now "comprehensively" regulated water pollution federally, a pair of 1981 Supreme Court cases appeared to hold the Act extinguished federal common law nuisance as applied to interstate water pollution disputes.[26]

Nevertheless, in 2023, after years of litigation, Judge Frizzell of the District Court for the Northern District of Oklahoma charted a different legal course, dusting off this old tort and putting it back to work. The District Court found the defendant corporations liable "for federal common law nuisance with respect to . . . their conduct in the Arkansas portion of the [Illinois River watershed]."[27] The District Court distinguished the two 1981 Supreme Court cases.[28] The interstate disputes in those two cases stemmed from point source pollution, while Oklahoma's current degraded water quality stems from the nonpoint source pollution that Tyson and its codefendants have caused.[29] The District Court determined that, since the Clean Water Act does not comprehensively regulate nonpoint source pollution, instead leaving regulation to the states,

[22] Illinois v. Milwaukee (*Milwaukee I*), 406 U.S. 91, 100 (1972).
[23] *Id.* at 105–108.
[24] *See*, *e.g.*, Robert Percival, *supra* note 20, at 768 (noting the "demise" of the tort, because "the federal common law of nuisance has been preempted in interstate water pollution disputes").
[25] Illinois v. Milwaukee (*Milwaukee II*), 451 U.S. 304, 317–18 (1981).
[26] *Id.*; Middlesex Cty. Sewage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981).
[27] Oklahoma ex rel. Drummond v. Tyson Foods, 2023 WL 259895 at *100 (N.D. Okla. 2023).
[28] *Id.* at *98–*100.
[29] *Id.*

federal common law nuisance still can be used in nonpoint source pollution cases.[30] As a result, Arkansas defendants must now develop remedial measures to undo the harm they inflicted on Oklahoma's scenic river.[31]

To help plug up the nonpoint source pollution leaks in the Clean Water Act's regulatory façade, federal courts should follow the North District of Oklahoma's lead, revive federal common law nuisance, and allow plaintiffs to put this regulatory tool to use. This reform, far from conflicting with the Clean Water Act, would support the Act's ambition to "prevent, reduce, and eliminate pollution" in the nation's waters by ensuring polluters can no longer hide behind loose state laws when their harm traverses borders.[32] As the Supreme Court once declared, no state should be "compelled to lower itself to the more degrading standards of a neighbor."[33] Federal common law nuisance would give states and their citizens a powerful tool to protect their water quality.

By reviving this tort, the states would regain a powerful tool to defend their environments from out-of-state harm. Below, Part III will explain how, before the 1972 Clean Water Act, federal courts resolved interstate disputes and compensated states for harm out-of-state actors caused to their citizens. But, as Part III will continue, with the Clean Water Act's passage, the Supreme Court retreated from applying federal common law nuisance, finding that the new Act preempted the old tort. However, as Part IV will demonstrate, the Clean Water Act has since proven to have many shortcomings, including largely failing to regulate nonpoint source

[30] *Id.*
[31] *Id.*
[32] 33 U.S.C. § 1251.
[33] *Milwaukee I*, 406 U.S. at 107.

pollution. Part V will argue that reviving federal common law nuisance could provide states an effective tool, under certain conditions, to combat nonpoint source pollution emanating from outside their territory. This approach makes sense legally and would complement existing regulation. Part VI will then consider how regulated groups may respond to reforms. Lastly, Part VII will conclude.

III. Old Solutions: The History of Federal Common Law Nuisance

A section on the history and economics of nuisance as a regulatory strategy is omitted.

A. The Rise of Federal Common Law Nuisance

The federal judiciary's duty to settle interstate water dispute arises from the idea that the states, having ceded their sovereign rights to resolve disputes diplomatically, require a tribunal where they can litigate disputes. After all, the Supreme Court has noted, when the first thirteen states united, they made the "forcible abatement of outside nuisances impossible."[48] The states thus require some "possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in [the Supreme Court]."[49] Analogizing the states to small European countries, the Supreme Court noted that if an upstream "State upon a navigable river like the Danube" caused pollution harm downstream, such harm would "amount to a casus belli," a legally sufficient justification for war in international law.[50] Therefore, federal law provided a forum so "a [s]tate with high water-quality standards may well ask that its strict standards be honored and that [the state] *not be compelled to lower itself to the more degrading standards of a neighbor*."[51]

[48] *Id.* at 104.
[49] *Id.*
[50] *Id.* at 107.
[51] *Id.* (emphasis added).

The idea that the states, as sovereigns, require access to the federal courts to settle their environmental differences echoes still today in modern caselaw. In a climate change suit, the Supreme Court noted that, "when a State enters the Union, it surrenders certain sovereign prerogatives. Massachusetts cannot invade Rhode Island to force reductions in greenhouse gas emissions, it cannot negotiate an emissions treaty with China or India."[52] The Court thus granted Massachusetts "special solicitude" to sue, despite potentially failing standing analysis.[53]

To fulfill this charge, the Supreme Court has created federal common law to resolve transboundary water cases between the states.[54] Due to the "uniquely federal concern . . . [of] the resolution of interstate controversies," the *Erie* admonition against federal common law is inapplicable to interstate water law.[55] The Court has developed several interrelated common law doctrines that "are inherently and fundamentally similar."[56] One doctrine is federal common law nuisance, which the Court first formally applied to the water pollution case context in 1901 to resolve a dispute between Missouri and Illinois.[57] The Court created another longstanding "close cousin" doctrine, equitable apportionment, to resolve water diversion and water quantity cases.[58] Indeed, whether a case is decided on equitable apportionment or federal common law nuisance grounds can be a "matter of perspective."[59] Importantly, in all its interstate water cases, the Court has stressed that "equitable principles, rather each state's own water law" apply, providing the states a neutral set of dispute resolution rules.[60]

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[52] Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 520 (2007).
[53] *Id.*
[54] The Court applied federal common law nuisance to resolve interstate river disputes as far back as 1851. One case involved a Virginian bridge that blocked Pennsylvanian ships. Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 621 (1851).
[55] Percival, *supra* note 20, at 769; *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law.").
[56] ROBIN CRAIG, ROBERT ADLER, & NOAH HALL, WATER LAW: CONCEPTS AND INSIGHTS 173 (2017).
[57] Missouri v. Illinois, 180 U.S. 208, 218–248 (1901).
[58] CRAIG, ADLER, & HALL, *supra* note 56, at 174 (2017).
[59] *Id.* at 172.
[60] *Id.* at 176.

The federal common law nuisance strand of this interrelated web of doctrines found its most resounding (and final) endorsement in a 1972 case, *Illinois v. Milwaukee (Milwaukee I)*. In that case, the Court reaffirmed that "when we deal with air and water in their ambient or interstate aspects, there is a federal common law."[61] When handling interstate pollution disputes under the federal common law, the Court "has spoken in terms of a public nuisance."[62] In these cases, the Court has "no fixed rules that govern" besides the "informed judgment of the chancellor" to ensure that "a State with high water-quality standards" will have "its strict standards . . . honored."[63] The Court drew on historic nuisance and equitable apportionment cases to support the idea that states that suffer an environment "destroyed or threatened by the act or persons beyond its control" must have a remedy through federal common law nuisance.[64]

B. *Milwaukee II*, *Sea Clammers*, and the End of Federal Common Law Nuisance

In 1972, the same year the Supreme Court decided *Milwaukee I*, Congress amended the Federal Water Pollution Control Act, creating the modern Clean Water Act.[65] These amendments were "'a total restructuring and complete rewriting of the existing water pollution legislation."[66] Through the Act, Congress intended to establish "a comprehensive long-range policy for the elimination of water pollution."[67]

[61] *Milwaukee I*, 406 U.S. at 103.
[62] *Id.* at 106.
[63] *Id.* at 107–108.
[64] *Id.* at 104–105.
[65] *Milwaukee II*, 451 U.S. at 317–18.
[66] *Id.*
[67] *Id.* at 318–19.

While the Clean Water Act announced the lofty goal of eliminating water pollution, the Supreme Court used the Act as a justification for eliminating federal common law nuisance from the books.[68] In 1981, the Supreme Court heard an appeal in the still-ongoing *Illinois v. Milwaukee* litigation (*Milwaukee II*). The Court reversed its previous *Milwaukee I* decision, determining that "no federal common law remedy was available to the states for water pollution" because Congress, by passing the 1972 Amendments to the Clean Water Act, had enacted "an all-encompassing program of water pollution regulation" precluding a tort remedy.[69] In *Middlesex County Sewage Authority v. National Sea Clammers Ass'n*, the Supreme Court reiterated that "the federal common law of nuisance in the area of water pollution is *entirely* pre-empted."[70]

In reaching the *Milwaukee II* decision, the Court relied heavily on the two facts. First, the Clean Water Act explicitly regulates point source pollution. Under the Clean Water Act, the Court noted, "every point source discharge is prohibited unless covered by a permit."[71] Second, the EPA had regulated the Milwaukee pollution at issue through point source pollution permitting. The overflows at issue in this case were "point source discharges and, under the Act . . . prohibited."[72] Thus, there was no longer a regulatory role for federal common law nuisance, as Illinois could now petition the EPA to deny or modify a permit if its citizens were harmed by out-of-state point source pollution.[73]

---

[69] *Milwaukee II*, 451 U.S. at 318.
[70] Middlesex Cty. Sewage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 22 (1981) (emphasis added).
[71] *Milwaukee II*, 451 U.S. at 318.
[72] *Id.* at 320.
[73] *Id.* at 326.

In *Sea Clammers*, a vigorous dissent argued that *Milwaukee II* had not actually found federal common law nuisance preempted but instead had made Clean Water Act compliance a "complete defense" to federal common law nuisance.[74] This contradicted Clean Water Act legislative history clarifying that "compliance with requirements under this Act would not be a defense to a common law action for pollution damages."[75]

If the *Sea Clammers* dissenters correctly characterized *Milwaukee II* as a creating a Clean Water Act compliance defense to federal common law nuisance, then a later case, *International Paper Co v. Ouellette*, made compliance with state nuisance law a defense, too. After a New York paper mill began emptying waste through a pipe "ending a short distance before the state boundary" into Lake Champlain, which straddles border between New York and Vermont, the lake filled with "foul, unhealthy, and smelly" pollutants rendering it "unfit for recreational use."[76] So, Vermont landowners sued in Vermont court, alleging a violation of Vermont's continuing nuisance doctrine.[77] The New York company appealed the suit to the Supreme Court, alleging that the Clean Water Act preempted all state nuisance law but the polluting state's law.[78] Despite the combined efforts of Vermont's Attorney General, thirteen other state Attorneys General, and the United States Solicitor General supporting the landowners, the Court agreed with the mill.[79] No state submitted an amicus brief supporting the mill.[80]

[74] Middlesex Cty. Sewage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 31 (1981) (J. Stevens, dissenting).
[75] *Id.*
[76] Int'l Paper Co. v. Ouellette, 479 U.S. 481, 484 (1987).
[77] *Id.*
[78] *Id.*
[79] *Id.* at 483.
[80] *Id.*

The Court reached its conclusion that any court "must apply the law of the State in which the point source is located" by relying on *Milwaukee II*.[81] The Court first noted its previous decision that "federal legislation now occupied the field, pre-empting all *federal* common law."[82] Then, the Court determined that the Clean Water Act's regulatory framework envisions state control over that state's territorial water but a "much lesser role for states" over shared waterbodies.[83] The Clean Water Act's comprehensive regulatory framework "left no room for supplementary state regulation."[84] The Court feared that applying the law of the state affected by pollution would "override . . . the policy choices made by the source state"[85] and that "the application of numerous States' laws would only exacerbate the vagueness and resulting uncertainty."[86]

The result of the *Milwaukee II*, *Sea Clammers*, and *International Paper Co.* series of cases is to offer states a federal forum for dispute resolution,[87] but to apply the law of the state where the pollution is emitted. Clean Water Act compliance and state law compliance are, in effect, complete defenses for a nuisance causing transboundary harm.

My paper continues by outlining the Clean Water Act's deficiencies, my proposed reform more specifically, and how regulated communities would respond to this reform. Additionally, I demonstrate that the Supreme Court's Milwaukee II and Sea Clammers decisions are inconsistent with still-existing federal common law.

[81] *Id.* at 487.
[82] *Id.* at 489 (emphasis added).
[83] *Id.* at 490.
[84] *Id.* at 491.
[85] *Id.* at 496.
[86] *Id.*
[87] *Id.* at 500.

Applicant Details

First Name	**Cameron**
Last Name	**Skinner**
Citizenship Status	**U. S. Citizen**
Email Address	**cgs0062@utulsa.edu**
Address	**Address** **Street** **1507 E Boston Ct** **City** **Broken Arrow** **State/Territory** **Oklahoma** **Zip** **74012**
Contact Phone Number	**5408090225**

Applicant Education

BA/BS From	**Virginia Commonwealth University**
Date of BA/BS	**December 2016**
JD/LLB From	**The University of Tulsa College of Law**
Date of JD/LLB	**May 6, 2024**
Class Rank	**5%**
Law Review/ Journal	**Yes**
Journal(s)	**Tulsa Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations **American Inns of Court - Hudson Hall/ Wheaton Inn**
Federal Bar Association - Northern/Eastern Oklahoma Chapter
Federal Bar Association - University of Tulsa College of Law Student Chapter
Archaeological Institute of America

Recommenders

Cravens, Sarah
scravens@wlu.edu
Little, Christine
Christine_little@oknd.uscourts.gov
Greenough, Kelly
kelly.greenough@oscn.net

This applicant has certified that all data entered in this profile and any application documents are true and correct.

May 24, 2023

The Honorable James O. Browning
Peter V. Domenici United States Courthouse
333 Lomas Boulevard, N.W., Room 660
Albuquerque, NM 87102

Dear Judge Browning,

I am a third-year law student at the University of Tulsa College of Law, and I write to apply for the term law clerk position in your chambers. My interest in becoming a law clerk stems from my experiences externing for two highly respected judges, and my involvement in *Tulsa Law Review*. As an Associate Editor, my Comment on the lack of federal legislation surrounding the sale of human skeletal remains was chosen for publication, earning the award for Best Overall Paper at the 2023 TLR Banquet. Entering my third year, I took on the roles of Co-Symposium Editor for *Tulsa Law Review*'s 2024 Symposium, Staff Editor, and President of the Federal Bar Association at the University of Tulsa.

During my first and second years at the University of Tulsa College of Law, I accepted an offer to extern for the Honorable Christine D. Little of the Northern District of Oklahoma, and the Honorable Kelly M. Greenough, Chief Judge of the Civil Division for the Tulsa County District Court. During my time with Judge Little, my assignments gave me a wide range of experience researching relevant case law, creating a Report and Recommendation, and drafting a full Opinion and Order on a Social Security Disability case for the United States District Court. In Judge Greenough's chambers, I helped decipher a technical, multi-million-dollar pipeline dispute and wrote a number of inter-chamber memos detailing my recommendations for ruling on ten Motions for Summary Judgment. These experiences taught me how to navigate complex legal issues, strengthen my research and writing skills, and perform in fast-paced environments. I believe that these legal experiences and my academic success will positively contribute to your work and provide your chambers with a hardworking individual willing to solve pressing issues.

Additionally, through my previous archaeological education and experience, I have contributed to a global research project regarding prehistoric climate reconstruction, and added to the understanding of how well museum storage techniques regarding animal remains preserve valuable biological data. My strong scientific background has helped hone my attention to detail and allowed me to make unique contributions to a larger collective.

I would welcome the opportunity to interview and discuss how my education and experience would contribute to your esteemed chambers. Your time and consideration are greatly appreciated, and I look forward to hearing from you.

Regards,

Cameron Skinner

Cameron Skinner
Tulsa, OK – (540) 809-0225 – cgs0062@utulsa.edu

Education:

The University of Tulsa College of Law, Tulsa, OK – May 2024
Juris Doctor Candidate

- GPA: 3.969; Rank 3 of 130
- Author: *"Hi, Is This Item Still Available?": Social Media as a Marketplace for Human Skeletal Remains*, 59 Tulsa L. Rev. (forthcoming 2024)
- *Tulsa Law Review*, Co-Symposium Editor; Staff Editor
- Federal Bar Association – TU Law Chapter, President
- CALI Excellence for the Future Award in Legal Writing I, Civil Procedure I & Civil Procedure II

Liverpool John Moores University, Liverpool, UK – September 2019
Master of Science in Bioarchaeology, Merit Honors

- Dissertation research areas: stable isotopic analysis of Neolithic faunal remains and a cave speleothem dating to MIS 7, excavated from Ballynamintra Cave, Ireland

Virginia Commonwealth University, Richmond, VA – December 2016
Bachelor of Science in Anthropology, History minor, *cum laude*

- Recipient of the 2016-2017 Anthropology Merit Scholarship; Excellence in Anthropology Award

Employment:

Ogletree Deakins – Oklahoma City, OK – June 2023-August 2023
Incoming Summer Associate

University of Tulsa College of Law – Tulsa, OK – February 2023-present
Legal Research Assistant for Professor Matt Lamkin

- Proofread and cite checked articles for publication
- Drafted open records requests for submission to individual state agencies
- Compiled data regarding metrics related to jail deaths across the country into a useable spreadsheet

Tulsa County District Court – Fall 2022
Judicial Extern for The Honorable Kelly M. Greenough

- Researched and drafted several internal memoranda regarding Motions for Summary Judgment
- Observed court proceedings such as Batterers Intervention Program hearings and jury trials

United States District Court for the Northern District of Oklahoma – Summer 2022
Judicial Extern for The Honorable Christine D. Little

- Researched and drafted an Opinion and Order, Report & Recommendation, and other court filings
- Proofread and cite checked multiple types of legal documents for Judge Little's chambers

JECT, Inc (Keller Williams Realty) – Georgetown, TX – July 2020-May 2021
Director of Operations

- Reviewed and executed confidential documents, contracts, and disclosures
- Managed client expectations and coordinated receipt of time-sensitive legal documents
- Negotiated contracts with a variety of advertisement partners in print and online media
- Created effective social media marketing and advertisements that resulted in quantified engagement data

Experience:

Archaeological Field Work

- **Poulton Research Project, Cheshire, UK – 2019**
  - Medieval Cistercian abbey and associated cemetery – focus on excavation of adult and juvenile human remains and laboratory and cataloguing techniques required by Liverpool John Moores University
- **Blackfriary Community Heritage and Archaeology Project, Trim, Ireland – 2016**
  - Medieval Dominican friary and adjoining cemetery – focus on excavation of adult human remains and the associated laboratory and cataloguing procedures required by the National Museum of Ireland

Skinner,Cameron Glenham
NAME (LAST FIRST MIDDLE)

May 24 2023

02 06 XX
DATE OF BIRTH

1567626
I.D. NUMBER

DEPT NO.	COURSE TITLE	CR	GRD	PTS
Summer Term 2021				
LAW	5034 Contracts	4	A	16.00
LAW	5152 Interview Cnsl Negtn	2	A	8.00
LT*	6 AT 6 ERN 6 GPH 24.00 PT 4.000 GPA			
LA*	6 AT 6 ERN 6 GPH 24.00 PT 4.000 GPA			
Fall Term 2021				
LAW	5013 Civil Procedure I	3	A	12.00
LAW	5154 Torts	4	A	16.00
LAW	6253 Legal Writing I	3	A	12.00
LAW	5101 Deans Sem Legal Profess	1	P	0.00
LAW	5583 Selling & Leasing Goods	3	A-	11.25
LT*	14 AT 14 ERN 13 GPH 51.25 PT 3.942 GPA			
LA*	20 AT 20 ERN 19 GPH 75.25 PT 3.961 GPA			
Spring Term 2022				
LAW	5023 Civil Procedure II	3	A	12.00
LAW	6262 Legal Writing II	2	A-	7.50
LAW	5703 Constitutional Law I	3	A	12.00
LAW	5064 Criminal Law/Admin	4	A	16.00
LAW	5114 Property	4	A	16.00
LT*	16 AT 16 ERN 16 GPH 63.50 PT 3.969 GPA			
LA*	36 AT 36 ERN 35 GPH 138.75 PT 3.964 GPA			
Summer Term 2022				
LAW	5070 Extern Course Judicial	0	P	0.00
LAW	6206 Field Studies Extern	6	P	0.00
LT*	6 AT 6 ERN 0 GPH 0.00 PT 0.000 GPA			
LA*	42 AT 42 ERN 35 GPH 138.75 PT 3.964 GPA			
Fall Term 2022				
LAW	5193 Decedent Estate Trust	3	A	12.00
LAW	5103 Prof Responsibility	3	A	12.00
LAW	6163 Cybersecur Law & Policy	3	A	12.00
LAW	6202 Field Studies Extern	2	P	0.00
LAW	6272 Legal Writing III	2	A	8.00
LAW	6240 Corp./Non-Profit Extern	0	P	0.00
LT*	13 AT 13 ERN 11 GPH 44.00 PT 4.000 GPA			
LA*	55 AT 55 ERN 46 GPH 182.75 PT 3.973 GPA			

DEPT NO.	COURSE TITLE	CR	GRD	PTS

DEPT NO.	COURSE TITLE	CR	GRD	PTS

**** ** ****
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VIRGINIA COMMONWEALTH UNIVERSITY
Box 842520 • Richmond, VA 23284-2520

Student No: V00666208 Date of Birth: 06-FEB Date Issued: 13-FEB-2018
WEB

Page: 1

Record of: Cameron Glenham Skinner
Issued To: Cameron G. Skinner
2701 Neabsco Common Pl
Apt. 227
Woodbridge, VA 221916702
United States

Course Level: Undergraduate
Student Type: Continuing

Program of Study
Bachelor of Science
Program : Anthropology-BS
College : Humanities and Sciences
Major : Anthropology
Minor : History

Degree Awarded Bachelor of Science 24-DEC-2016
Primary Degree
Program : Anthropology-BS
College : Humanities and Sciences
Major : Anthropology
Minor : History
Inst. Honors: Cum Laude

SUBJ	NO.	COURSE TITLE	CRED GRD	PTS R
TRANSFER CREDIT ACCEPTED BY THE INSTITUTION:				
201510		AdvPlacement Ceeb		
HIST	103	SURVEY OF AMERICAN HISTORY	3.00 AP	
HIST	104	SURVEY OF AMERICAN HISTORY	3.00 AP	
Ehrs: 6.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00				
201310		VA Community College System		
UNIV	111	FOCUSED INQUIRY 1	0.00 TR	
UNIV	112	FOCUSED INQUIRY 2	3.00 TR	
Ehrs: 3.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00				
201320		VA Community College System		
UNIV	200	WRITING & RHETORIC WORKSHOP II	3.00 TR	
Ehrs: 3.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00				
201410		Roanoke College		
EDUS	300	FOUNDATIONS OF EDUCATION	4.00 TR	

********** CONTINUED ON NEXT COLUMN **********

SUBJ	NO.	COURSE TITLE	CRED GRD	PTS R
Transfer Information continued:				
HIST	191	TOPICS:	4.00 TR	
Ehrs: 8.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00				
201420		Roanoke College		
ANTH	105	INTRODUCTION TO ARCHAEOLOGY	4.00 TR	
FREN	201	INTERMEDIATE FRENCH	4.00 TR	
HUMS	1XX	VALUES PRACTICUM	4.00 TR	
UNIV	1XX	TEXTS, RHETORIC & MEDIA	4.00 TR	
Ehrs: 16.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00				
201230		Coll William And Mary		
HIST	2XX	AMER HISTORY & HIST SITES	4.00 TR	
Ehrs: 4.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00				
201510		Intl Baccalaureate		
ANTH	103	CULTURAL ANTHROPOLOGY	3.00 IB	
Ehrs: 3.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00				
201630		Univ Calif Los Angeles		
ANTH	398	FIELD INVESTIGATIONS IN ANTH	8.00 TR	
Ehrs: 8.00 GPA-Hrs: 0.00 QPts: 0.00 GPA: 0.00				
INSTITUTION CREDIT:				
Fall 2014				
Humanities and Sciences				
Anthropology				
Transfer				
ANTH	302	ARCHAEOLOGICAL THEORY WI	3.00 B	9.00
BIOL	101	BIOLOGICAL CONCEPTS	3.00 B	9.00
ENGL	215	TEXTUAL ANALYSIS	3.00 A	12.00
HUMS	202	CHOICES IN CONSUMER SOCIETY	1.00 P	0.00
MATH	141	ALGEBRA WITH APPLICATIONS	3.00 B	9.00
Ehrs: 13.00 GPA-Hrs: 12.00 QPts: 39.00 GPA: 3.25				
Good Standing				

********** CONTINUED ON PAGE 2 **********

Bernard C. Hamm, Jr., University Registrar

VIRGINIA COMMONWEALTH UNIVERSITY
Box 842520 • Richmond, VA 23284-2520

Student No: V00666208 Date of Birth: 06-FEB Date Issued: 13-FEB-2018
WEB

Record of: Cameron Glenham Skinner Page: 2
Level: Undergraduate

Institution Information continued:

SUBJ NO.	COURSE TITLE	CRED GRD	PTS R
Spring 2015			
Humanities and Sciences			
Anthropology			
Continuing			
ANTH 230	ANTHROPOLOGICAL LINGUISTICS	3.00 A	12.00
HIST 374	HIST OF THE ANDES FROM 1800	3.00 B	9.00
INTL 105	INTERNATIONAL RELATIONS	3.00 W	0.00
MATH 151	PRECALCULUS MATH	4.00 B	12.00
SOCY 101	GENERAL SOCIOLOGY	3.00 A	12.00
Ehrs: 13.00 GPA-Hrs: 13.00 QPts:		45.00 GPA:	3.46
Good Standing			
Summer 2015			
Humanities and Sciences			
Anthropology			
Continuing			
GSWS 201	INTRO GENDER, SEXUALITY & WMNS	3.00 A	12.00
STAT 210	BASIC PRACTICE OF STATISTICS	3.00 B	9.00
Ehrs: 6.00 GPA-Hrs: 6.00 QPts:		21.00 GPA:	3.50
Good Standing			
Fall 2015			
Humanities and Sciences			
Anthropology			
Continuing			
ANTH 220	CULTURAL ANTHROPOLOGY	3.00 A	12.00
ANTH 315	ANTH FIELD METH & RES DESIGN	3.00 A	12.00
ANTH 328	LANGUAGE, CULTURE, & COGNITION	3.00 A	12.00
HIST 303	GREEK CIVILIZATION	3.00 A	12.00
INNO 200	INTRO TO INNO & VENTURE CREATN	1.00 A	4.00
Ehrs: 13.00 GPA-Hrs: 13.00 QPts:		52.00 GPA:	4.00
Dean's List			
Good Standing			
Spring 2016			
Humanities and Sciences			

********** CONTINUED ON NEXT COLUMN **********

Term Information continued:
Anthropology
Continuing

SUBJ NO.	COURSE TITLE	CRED GRD	PTS R
ANTH 307	HUMAN OSTEOLOGY	3.00 A	12.00
ANTH 389	WORLD ARCHAEOLOGY	3.00 A	12.00
ANTH 399	JUNIOR SEMINAR	1.00 A	4.00
ANTH 425	REL,MAGIC&WITCHCRAFT WI	3.00 B	9.00
HIST 304	ROMAN CIVILIZATION	3.00 A	12.00
Ehrs: 13.00 GPA-Hrs: 13.00 QPts:		49.00 GPA:	3.77
Dean's List			
Good Standing			
Summer 2016			
Humanities and Sciences			
Anthropology			
Continuing			
STUA 006	STUDY ABROAD PROGRAMS	6.00 NC	0.00
Ehrs: 0.00 GPA-Hrs: 0.00 QPts:		0.00 GPA:	0.00
Good Standing			
Fall 2016			
Humanities and Sciences			
Anthropology			
Continuing			
ANTH 301	HUMAN EVOLUTION WI	3.00 B	9.00
ANTH 454	THEORY IN CULTURAL ANTHRO	3.00 B	9.00
ANTH 490	ANTHROPOLOGY SENIOR CAPSTONE	3.00 A	12.00
ANTZ 301	HUMAN EVOLUTION LAB	1.00 B	3.00
HIST 333	HIST OF THE JEWISH PEOPLE I	3.00 A	12.00
Ehrs: 13.00 GPA-Hrs: 13.00 QPts:		45.00 GPA:	3.46
Good Standing			
Last Standing: Good Standing			

********** CONTINUED ON PAGE 3 **********

TRANSCRIPT GUIDE PRINTED ON REVERSE SIDE

Bernard C. Hamm, Jr., University Registrar

Washington and Lee University School of Law
Sydney Lewis Hall, Lexington VA 24450

June 13, 2023

Dear Judge,

I write to recommend Cameron Skinner, an applicant for a clerkship in your chambers after her graduation from the University of Tulsa College of Law in Spring 2024. Though I am just taking up a new position at Washington & Lee this month, I spent the last two years at TU Law, where I had the pleasure of teaching Cameron in both Torts (Fall 2021) and Constitutional Law I (Spring 2022). She was an exceptional student in both classes. She distinguished herself not only in those classes, but during those semesters and in the year since then in the conversations we have had about research, about her work outside the law school, and so on. I am confident that she would be an asset to your chambers.

Cameron was consistently well prepared on the assigned material and always ready (indeed happy) to tackle challenging questions. She is a good lateral thinker, and anticipates connections and questions well. Her ability to pick up new doctrine, analyze new fact patterns and apply the law accurately, and convey her analysis well were among the top in her class at TU. Both of the classes I taught her in were large 1L sections, so did not have an opportunity to critique her research or writing skills. I only assessed her work through in-class discussion and timed exams. But within those parameters, I can recommend her without hesitation. Furthermore, as noted above, I have had opportunities to discuss research projects with Cameron on many occasions, and those discussions certainly indicate strong research and analytical skills beyond what I saw in my large classes.

In addition, Cameron is simply a bright and engaging person to be around. She maintains a high standard in her work, but does not let that keep her from living a life that allows her to be an interesting person. She is kind and generous to her peers and has a great sense of humor. She works hard and would be a pleasure to work with. If I can provide any further information that would be helpful to you in the selection process, please do not hesitate to get in touch.

Sincerely,

/s/ Sarah Cravens

Sarah M. R. Cravens
Visiting Professor of Law
Washington and Lee University School of Law
Sydney Lewis Hall
Lexington, VA 24450
scravens@wlu.edu
(234) 738-2665 (cell)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Chambers of
Christine D. Little
United States Magistrate Judge
Northern District of Oklahoma

333 West Fourth Street
Tulsa, OK 74103
(918) 699-4765 (phone)
(918) 699-4764 (fax)

February 15, 2023

Re: Letter of Recommendation for Cameron Skinner

To Whom It May Concern:

I am delighted to write this letter of recommendation for Cameron Skinner. Cameron was an extern for my chambers in the summer of 2022 through the University of Tulsa College of Law's externship program. During her externship, I observed firsthand Cameron's intelligence, work ethic, and research and writing abilities. Prior to the externship, I selected Cameron from the pool of extern applicants due to her exceptional academic record, her interesting and varied employment and education background, and her communication skills during an interview.

Of all of the externs I have overseen at the court in the last 10 years, Cameron truly stood out in her intellect, diligence, and ability to quickly identify legal issues and reduce her analysis to writing. Cameron is proactive. She would ask for another project each time she finished assigned work. During her summer externship term, she completed several research and writing projects for my chambers. Her work included drafting a report and recommendation and an opinion and order, both of which were helpful in completing chambers work. She also conducted legal research and interacted with me on several legal issues. Cameron also attended and observed court proceedings.

Cameron is very dependable and organized, and her legal analysis and writing are excellent. She is also interesting, personable, and kind, and she cares about the impact of legal issues on people. She thinks, communicates, and writes clearly and concisely. It is my opinion that Cameron will excel in everything she does, whether that is work for a private firm, a judicial chambers, or a government agency. She has the traits that are conducive to the high quality, complex legal work that is required to be a great lawyer.

In conclusion, I highly recommend Cameron. If you wish to discuss her further, please contact me.

Sincerely,

Christine D. Little

May 26, 2023

Dear Judge:

Please accept this letter in whole-hearted support for Cameron Skinner to be your next law clerk. Ms. Skinner was my extern in the fall of 2022. Her responsibilities included legal research and writing, court observation, and working through a series of summary judgment motions in a large pipeline construction case. She handled all of these duties with professionalism, all while maintaining both a sense of intellectual curiosity and good humor. Her ability to quickly identify and analyze issues is what I would expect to see in more seasoned lawyers.

I hope you will give her application serious consideration. You would be fortunate to have Ms. Skinner on your staff.

Warm regards,

Kelly M. Greenough,

District Judge, Tulsa County Oklahoma

Kelly Greenough - kelly.greenough@oscn.net

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

[redacted]	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No.** [redacted]
	)	
KILOLO KIJAKAZI,	)	
Acting Commissioner of the	)	
Social Security Administration,[1]	)	
	)	
Defendant.	)	

DRAFT

OPINION AND ORDER

Plaintiff seeks judicial review of a decision of the Commissioner of the Social Security Administration (Commissioner) denying Social Security disability benefits. The parties have consented to proceed before a United States Magistrate Judge in accordance with 28 U.S.C. § 636(c)(1), (2). For the reasons set forth below, the Court **reverses** the Commissioner's decision denying benefits and **remands** the case for further proceedings.

I. Standard of Review

The Social Security Act (the Act) provides disability insurance benefits to qualifying individuals who have a physical or mental disability. *See* 42 U.S.C. § 423. The Act defines "disability" as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be

[1] Pursuant to Federal Rule of Civil Procedure 25(d)(1), Kilolo Kijakazi is substituted as the defendant in this action, effective upon her appointment as Acting Commissioner of Social Security in July 2021. No further action need be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." *See* 42 U.S.C. § 423(d)(1)(A).

Judicial review of a Commissioner's disability determination "'is limited to determining whether the Commissioner applied the correct legal standards and whether the agency's factual findings are supported by substantial evidence.'" *Noreja v. Soc. Sec. Comm'r,* 952 F.3d 1172, 1177 (10th Cir. 2020) (citing *Knight ex rel. P.K. v. Colvin,* 756 F.3d 1171, 1175 (10th Cir. 2014)). "Substantial evidence is more than a mere scintilla and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1178 (quoting *Grogan v. Barnhart,* 399 F.3d 1257, 1261 (10th Cir. 2005)); *see also Biestek v. Berryhill,* --- U.S. ---, 139 S. Ct. 1148, 1154 (2019). "Evidence is not substantial if it is overwhelmed by other evidence in the record or constitutes mere conclusion." *Noreja,* 952 F.3d at 1178 (quoting *Grogan,* 399 F.3d at 1261-62).

So long as supported by substantial evidence, the agency's factual findings are "conclusive." *Biestek,* 139 S. Ct. at 1152 (quoting 42 U.S.C. § 405(g)). Thus, the court may not reweigh the evidence or substitute its judgment for that of the agency. *Noreja,* 952 F.3d at 1178.

II. Background and Procedural History

Plaintiff applied for a period of disability and disability insurance benefits under Title II of the Social Security Act (Act), and a Title XVI application for supplemental security income, on [redacted]. (R. 9-29). Plaintiff alleged a disability onset date of [redacted]. (R. at 271, 275-276). He alleged disability due to legs/ankle injury, chronic pain in legs/ankles, trouble walking/standing, weight loss, passing out,

uncontrolled diabetes, depression, and neuropathy in R/L feet. (R. 275). Plaintiff was 55 years old on his alleged onset date. (R. at 9, 232). Plaintiff possesses a high school education with one year of college level education. (R. 276). Before his alleged disability, Plaintiff worked as a bartender, bellhop, and a waiter. (R. at 277, 316).

Plaintiff's application was denied on initial review and on reconsideration. Subsequently, his claim was heard via telephone by an Administrative Law Judge (ALJ) on [redacted], after an earlier hearing set for [redacted] was rescheduled due to the Plaintiff's hospitalization. (R. 12). The [redacted] hearing included testimony by Plaintiff, a Medical Expert (ME), and a Vocational Expert (VE). *Id.* On [redacted], the ALJ issued an unfavorable decision denying disability benefits. (R. 9-29). The Appeals Council issued a decision on [redacted], denying Plaintiff's request for review of the ALJ's decision. (R. 1-6). Accordingly, the ALJ's [redacted] decision became the Commissioner's final decision. (R. 1). Following the Appeals Council's denial, Plaintiff timely filed a Complaint in this Court. (*See* Doc. 2). Accordingly, the Court has jurisdiction to review the ALJ's [redacted] decision under 42 U.S.C. § 405(g).

III. The ALJ's Decision

The Commissioner uses a five-step, sequential process to determine whether a claimant is disabled and, therefore, entitled to benefits. *See* 20 C.F.R. § 404.1520(a)(4)(i)-(v). A finding that the claimant is disabled or is not disabled at any step ends the analysis. *See id.*; *see also Lax v. Astrue*, 489 F.3d 1080, 1084 (10th Cir. 2007) (citing *Williams v. Bowen*, 844 F.2d 748, 751 (10th Cir. 1988)). The claimant bears the burden on steps one through four. *Lax*, 489 F.3d at 1084.

At step one, the claimant must demonstrate that he is not engaged in any substantial gainful activity. *See Lax*, 489 F.3d at 1084. Here, the ALJ determined Plaintiff had not engaged in substantial gainful activity since his alleged onset date of [redacted] (R. 14).

At step two, the claimant must establish an impairment or combination of impairments that is severe. *See Lax*, 489 F.3d at 1084. Here, the ALJ determined that Plaintiff has severe impairments of diabetes mellitus, alcohol dependence, Status Post Fractures of the right shoulder, wrist, and ankle (status post open reduction internal fixation (ORIF); and Status Post Fractures of the Left Ankle and Right Eighth and Tenth Ribs with Residuals)). (R. 14-15).

At step three, the ALJ determines whether the claimant's severe impairment or impairments is equivalent to one that is listed in Appendix 1 of the regulation, which the Commissioner "acknowledges are so severe as to preclude substantial gainful activity." *Williams*, 844 F.2d at 751 (internal quotation and citation omitted); *see* 20 C.F.R. §§ 404.1520(d); 20 C.F.R. Part 404, subpt. P, app'x 1 (Listings). Here, the ALJ found that Plaintiff's physical and mental impairments do not meet or equal the criteria for any Listing, specifically noting Listings under Sections 1.00 (musculoskeletal system), and 9.00 (endocrine disorders). (R. 17-18). The ALJ acknowledged that Listing 9.00 was abolished effective June 7, 2011, but noted that the updated Listing 9.00 provides guidance on how to evaluate the effects of endocrine disorders, such as diabetes mellitus. (R. 17).

The ALJ also discussed the "paragraph B" criteria—four areas of mental functioning used to determine whether a claimant's mental impairments functionally equal

a Listing. *See* 20 C.F.R. § 404 Subpt. P App'x 1. The ALJ found that Plaintiff has a mild limitation in each of the four relevant domains—understanding, remembering, and applying information; interacting with others; concentrating, persisting, or maintaining pace; and adapting or managing oneself. (R. 15-16). Because Plaintiff does not have at least one extreme or two or more marked limitations, the ALJ found the paragraph B criteria are not satisfied. (R. 17).

At step four, the claimant must show that his impairment or combination of impairments prevents him from performing work he has performed in the past. The ALJ first determines the claimant's residual functional capacity (RFC) based on all the relevant medical and other evidence. 20 C.F.R. § 404.1520(e); *see also See Winfrey v. Chater*, 92 F.3d 1017, 1023 (10th Cir. 1996). The ALJ next determines the physical and mental demands of the claimant's past relevant work. *Winfrey*, 92 F.3d at 1023 (citing 20 C.F.R. § 404.1520(e)). Finally, the ALJ determines whether the RFC from phase one allows the claimant to meet the job demands found in phase two. *Id.*

Here, the ALJ determined that Plaintiff has the RFC

> to perform light work as defined in 20 CFR 404.1567(b) and 416.967(b) except he can occasionally reach overhead with the right upper extremity. The claimant can operate foot controls frequently with the left lower extremity and occasionally with the right lower extremity. The claimant can occasionally climb ramps and stairs. The claimant cannot climb ropes, ladders, or scaffolds. The claimant can occasionally crouch, crawl, kneel, stoop and balance on uneven, moving, or narrow surfaces. The claimant can have occasional exposure to vibrations but cannot have any exposure to unprotected heights or dangerous moving machinery. The job cannot require commercial driving.

(R. 18). Citing the regulatory Agency definition of "light work" as controlling over contradictory VE testimony, the ALJ found that Plaintiff is capable of performing his past relevant work as a Waiter (Dictionary of Occupational Titles (DOT) # 311.477-030). (R. 28-29). The ALJ therefore found Plaintiff not disabled at step four. (R. 29).

IV. Discussion

Plaintiff alleges that he is unable to perform the job of Waiter due to a limitation of standing and/or walking up to 6 hours in an 8-hour day (6-hour limitation). He contends the ALJ's determination that he retains the capacity to perform the demands of his relevant past work based on the regulatory definition of "light work" is unsupported by substantial evidence in light of the VE's corrected testimony. Furthermore, Plaintiff argues that the ALJ improperly violated controlling law by failing to resolve the discrepancy between the DOT and VE's testimony.

VE Testimony Conflict

During the [redacted] hearing, [redacted] testified as a vocational expert. (R. 1125-1131). She testified that Plaintiff had previously worked as a bartender, bellhop, and waiter. (R. 1126). After testifying that Plaintiff had no transferable skills from his relevant past work to other light or sedentary jobs, the ALJ presented a hypothetical, which included "light work" but failed to note expressly that the individual would be limited to 6-hours standing or walking in an 8-hour period:

> Q: So let's assume a hypothetical individual of the same age and education as the claimant with a[n RFC] to perform light work, with occasional overhead reaching with the right upper extremity. Frequently operate foot controls with the left lower extremity, and occasionally operate foot controls with the right lower extremity.

> Occasionally climb ramps and stairs. No climbing ropes, ladders, or scaffolds. Occasionally crouch, crawl, kneel, stoop, and balance on uneven, moving, or narrow surfaces. Occasional exposure to vibrations. No work involving any exposure to unprotected heights, dangerous moving machinery, and no commercial driving. Would that individual be able to perform any of the past work?
>
> A: Let me double check here. The waiter looks like the only job that would satisfy that.

(R. 1126-1127).

Later, during questioning from Plaintiff's counsel, [redacted] testified that the 6-hour limitation, if included in the hypothetical RFC, would eliminate the Waiter job:

> Q: Okay. So, if a person could only stand on their feet three-quarters of a shift, but would need to sit down the rest of the time, would they be able to perform their job as a waiter?
>
> A: No.
>
> ATTY: Okay. Thank you. Judge, I have no further questions.
>
> ALJ: Okay. Let me just maybe wanna look at one thing. Okay. Hold on, let's see.
>
> Q [by ALJ]: Okay, so let me just follow up because Dr. [redacted] did say – if the – so if we added standing and walking should be done – so take my facts that I gave you, but standing and walking up to six hours. Would that eliminate the waiter?
>
> A: Standing and walking up to six hours?
>
> Q: Yeah.
>
> A: If their shift was longer than six hours, then yes, it would eliminate that job.[2]

[2] SSR 96-8p defines that, for purposes of determining RFC (and therefore capability of performing relevant past work), the standard is "8 hours a day, for 5 days a week, or an equivalent work schedule." SSR 96-8p, 1996 WL 374184, at *1.

> ALJ: Okay. Thanks so much. And so obviously that – well that is covered, never mind.

(R. 1130-1131).

Controlling and supporting case law is clear that an ALJ's failure to ask a VE to reconcile a conflict between the VE's testimony and the DOT is a reversible error. *Haddock v. Apfel*, 196 F.3d 1084, 1087 (10th Cir. 1999); *Butler v. Colvin*, 172 F. Supp. 3d 1221, 1224 (E.D. Okla. 2016); *Kreuger v. Astrue*, 337 F. App'x 758, 761-62 (10th Cir. 2009). Furthermore, under SSR 00-4p, "[w]hen a VE [. . .] provides evidence about the requirements of a job or occupation, the [ALJ] has an affirmative responsibility to ask about any possible conflict between [the VE] evidence and information provided in the DOT." SSR 00-4p, 2000 WL 1898704 at *4.

Once a legitimate conflict has been found between VE testimony and the DOT, the ALJ then has an affirmative duty to "investigat[e] and elici[t] a **reasonable explanation** for any conflict between" them (emphasis in original). *Bier v. Colvin*, 15 F. Supp. 3d 1143, 1147 (D.N.M.). Supporting case law states that "[q]uestioning a [VE] about the source of [their] opinion and any deviations from a publication recognized as authoritative by the agency's own regulations falls within this duty." *Frazee v. Barnhart*, 259 F. Supp. 2d 1182, 1196 (D. Kan.) (citing *Haddock v. Apfel*, 196 F.3d 1084, 1091 (10th Cir. 1999)). Additionally, according to SSR 00-4p, "occupational evidence provided by a [VE] generally should be

consistent with the occupational information supplied by the DOT." SSR 00-4p, 2000 WL 1898704 at *2. When there is an apparent conflict between VE testimony and DOT information, "the [ALJ] will inquire, on the record, as to whether or not there is such consistency." *Id.* This is defined as part of an ALJ's duty to fully develop the record. *Id.*

Here, the ALJ has failed in that duty. While the ALJ did attempt to resolve other parts of the VE's testimony, that effort is absent in regard specifically to the corrected testimony adding the 6-hour limitation. (R. 1127-1131). Shortly after the VE stated that the Waiter job would be eliminated with the addition of the 6-hour limitation, the ALJ adjourned the hearing and ended the phone call. (R. 1131). The ALJ's statement of "[a]nd so, obviously that – well that is covered, never mind" immediately after the VE's correction offers no attempt at further questioning of the VE as to the discrepancy between the DOT classification of Waiter as "light work" and her testimony that an inability to stand/walk eight hours in an eight-hour period would preclude Plaintiff's ability to perform the Waiter job. *Id.*

Accordingly, the ALJ's failure to investigate and elicit a reasonable explanation for the conflict between the corrected VE testimony and the DOT constitutes a reversible error.

Weight of VE Testimony versus DOT Definitions

Without resolving the conflict between the corrected VE testimony and the DOT, the ALJ made a determination of Plaintiff's nondisability by "specifically draw[ing] attention to Agency definitions of light work." (R. 29). The ALJ relied on a quote from SSR 00-4p, stating "the regulatory definitions of exertional levels are controlling"

(emphasis in original), despite the presence of a reason to classify the exertional demands of an occupation differently. *Id.*

Under Social Security Ruling 00-4p (SSR), the exertional level classifications are controlling when there is evidence that an occupation meets the exertional demands of a regulatory definition and VE testimony suggests otherwise. SSR 00-4p, 2000 WL 1898704 at *2. However, the SSR 00-4p also makes clear that "neither the DOT nor the [VE evidence] automatically 'trumps' when there is a conflict." *Id.*

Because the ALJ failed to adequately explain the conflict between the VE testimony and the DOT definition of Waiter on the record during the hearing, her reliance on SSR 00-4p to find the exertional level classifications are controlling is misplaced. This is because SSR 00-4p requires the resolution of a conflict of occupational information by the adjudicator before making a determination as to which evidence controls. *See id* ("Neither the DOT nor the [VE] evidence automatically 'trumps' when there is a conflict. The adjudicator must resolve the conflict [. . .].").

Accordingly, the ALJ's use of a quote from the preceding section of SSR 00-4p in favor of the DOT definition of "light work" is not an adequate explanation for the conflict between the VE testimony and the DOT definition.

Medical Evidence

During the [redacted] hearing, [redacted], M.D. testified as an ME. (R. 1105-1113). Dr. [redacted] testified that he had not personally examined or treated the Plaintiff but had reviewed the Plaintiff's file and medical records. (R. 1106). After

testifying as to the Plaintiff's medical status, Dr. [redacted] summarized the limitations he believed Plaintiff's ailments caused:

> A: The major – there would be some lifting restrictions due to the multiple fractures, even though there was appeared to be healed, but I would say ten pounds frequently, 20 occasionally. Don't see any restrictions on sitting. Standing and walking, combined, up to six hours a day. Reaching, handling, fingering, feeling, I see no restrictions. Pushing, pulling would be up to the weight limits mentioned. Use of foot controls: frequent left, occasionally right. Stairs and ramps occasionally.

(R. 1110).

And later in the hearing, added:

> A: As far as climbing stairs or ramps, occasional. I would not advise any ladders, scaffolding or any other hazardous activity, including commercial driving [. . .]. Balancing, stooping, kneeling, and crouching would be occasional.

(R. 1111).

In her opinion, the ALJ stated she "finds Dr. [redacted]'s opinion persuasive," and based her RFC determination "upon the opinion of [Dr. [redacted]]," but chose not to specifically accept the standing and walking limitation into Plaintiff's RFC determination, despite doing so for all other limitations proposed by Dr. [redacted]. (R. 26, 28).

An ALJ is not required to accept all aspects of a ME's testimony but must sufficiently explain their reasoning for rejecting a portion of ME testimony while accepting others. *See Mays v. Colvin*, 739 F.3d 569, 574-76 (10th Cir. 2014). Under *Hamlin* and *Lax*, an "ALJ may not pick and choose which aspects of an uncontradicted medical opinion to believe," and "cannot substitute her lay opinion for that of a medical professional." *Hamlin v. Barnhart*, 365 F.3d 1208, 1219 (10th Cir. 2004); *Lax v. Astrue*, 489 F.3d 1080,

1089 (10th Cir. 2007). This is supported by additional case law, such as *Strickland* which made clear that "an ALJ may not interpose [their] own judgment over a physician with respect to medical findings." *Strickland v. Astrue*, 496 F. App'x 826, 834 (10th Cir. 2012).

The ALJ cites the results of a Cooperative Disability Investigations Unit (CDIU) investigation, where agents observed the Plaintiff "st[anding] for the approximately 40-minute duration of the meeting," "standing and walking without the use of any assistive device," and "walk[ing] across the parking lot" as evidence that Plaintiff can perform the full standing and walking requirements of light work. (R. 24-25). Coupling the standing and walking requirements of light work, which are defined as "a good deal," with the assessed 6-hour limitation from Dr. [redacted], there is a stark difference between the ALJ's reliance on an investigation that elicited 40 minutes of standing and a walk across a parking lot, and the conclusion that Plaintiff possesses the full capability to perform a Waiter job. *Id.* This is not an adequate explanation for the rejection of Dr. [redacted]'s proposed 6-hour limitation, and indicates that the ALJ has improperly substituted her own judgment in the face of contradictory ME testimony that suggests otherwise, despite relying on other aspects of the same testimony to create the RFC determination.

By declining to extend deference to one aspect of an uncontradicted medical opinion without sufficient explanation, and subsequently making a finding of nondisability, the ALJ has committed an error under *Hamlin*. 365 F.3d at 1219. Furthermore, by accepting Dr. [redacted]'s testimony as persuasive; grounded upon enough objective evidence to create the basis for her RFC determination, and then choosing to reject the standing and walking limitation he assessed, the ALJ has substituted her own lay opinion for that of a

medical professional, which is improper under controlling case law. *See Lax*, 489 F.3d at 1089; *Winfrey v. Chater*, 92 F.3d 1017, 1022 (10th Cir. 1996); *Strickland*, 496 F. App'x at 834.

By determining that Plaintiff's standing limitation is not prohibitive of his ability to perform the Waiter job, the ALJ must be finding that Plaintiff is capable of actually standing and/or walking more than 6 hours in an 8-hour period, contradictory to that of Dr. [redacted]'s express assessed limitation. This finding represents an improper interposition of the ALJ's own judgment with respect to medical testimony. *Lax*, 489 F.3d at 1089; *Winfrey*, 92 F.3d at 1022, *Strickland*, 496 F. App'x at 834.

Accordingly, Dr. [redacted]'s objective findings are not substantial evidence supporting less restrictive standing and walking limitations than he himself assessed, and the results of the CDIU investigation do not reasonably support the conclusion that Plaintiff can perform the full range of light work without the inclusion of the specified standing limitation within the RFC determination.

V. Conclusion

For the reasons set forth above, the Court finds the ALJ's determination that Plaintiff can perform the demands of relevant past work is not supported by substantial evidence. Therefore, the decision of the Commissioner finding Plaintiff not disabled for the relevant period is **reversed and remanded** for further proceedings consistent with this opinion.

ORDERED this ____ day of ____, 2022.

No. 22-5306-NDO

In the United States Court of Appeals
for the Tenth Circuit

SEAN M. FLAHARTY,
Plaintiff-Appellant,
v.

DIGITAL DESIGN GROUP, INC.,
Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Oklahoma
Civil Action No. 4:2021cv01001
The Honorable Judge Lynn N. Hughes, presiding

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STATEMENT OF JURISDICTION

The District Court for the Northern District of Oklahoma had subject matter jurisdiction over this age discrimination claim pursuant to federal question under 28 U.S.C.A. § 1331, because the case arises from an age-discrimination claim under the federal Age Discrimination in Employment Act. 29 U.S.C.A. § 623. This Court has jurisdiction over this matter pursuant to 28 U.S.C.A. § 1291. On July 27, 2022, the district court signed an order granting Digital Design Group's Motion for Summary Judgment. ROA at 54. This appeal, therefore, is from a final decision from a trial court within this Court's territorial jurisdiction. Mr. Flaharty filed a Notice of Appeal on August 19, 2022. ROA at 55. The notice of appeal was timely filed in accordance with Fed. R. App. P. 4(a). *Id.*

ISSUES PRESENTED FOR REVIEW

I. Under the Federal Rules of Civil Procedure, summary judgment may not be granted if there are any genuine issues of material fact. Additionally, under the summary judgment standard, the court must construe all evidence and inferences in favor of the non-moving party. Mr. Flaharty presented sufficient evidence of discriminatory pretext regarding Digital Design Group's given reason for termination by showing disparate treatment, untrustworthy behavior and the prevalence of ageist comments in the workplace. Did the trial court abuse its discretion when it granted Digital Design Group's Motion for Summary Judgement despite the presence of a genuine issue of material fact regarding pretext?

STATEMENT OF THE CASE

This case arose from Digital Design Group, Inc.'s ("DDG") constructive termination of Mr. Sean Flaharty ("Mr. Flaharty"), despite his long work history and exemplary performance reviews. As a result of DDG's negative employment action, Mr. Flaharty reasonably brought suit against DDG for age discrimination. ROA at 2. The trial court properly found that Mr. Flaharty had met the burden of proof for his prima facie case, and that DDG had articulated a legitimate, nondiscriminatory reason for termination. ROA at 54. However, the court granted summary judgment in DDG's favor, reasoning that Mr. Flaharty was unable to prove the given reason for termination was merely pretext. *Id*.

A. Background

Mr. Flaharty was employed at DDG, an architecture firm, for over ten years, and had worked as an architect for over thirty-four. ROA at 35. His job title was "Senior Design Specialist," and he worked as part of an architecture team that would create construction renderings, detailed specs, and other important information for client projects. ROA at 25, 35-36. Throughout his time at DDG, Mr. Flaharty consistently completed required continuing education hours to maintain licensure, received commendations for client satisfaction, and performed excellently on internal evaluations. ROA at 36, 39. In December of 2020, at the age of fifty-seven, Mr. Flaharty was constructively terminated by the owner and president of DDG.

ROA at 37. Mr. Flaharty was faced with an illusion of choice – taking a demotion and being reassigned to a satellite office over one-hundred miles away from his home, or losing access to retirement benefits that would vest in nine short months by submitting his resignation. ROA at 37, 40.

B. Disparate Treatment in the Training for New Technology

Prior to Mr. Flaharty's termination, the executives at DDG implemented a plan to "restructure" the goals of the firm, with emphasis moving away from technical architecture work and towards design and aesthetic projects. ROA at 30, 33, 38. Despite claims that DDG suffered significant financial difficulties in 2020, this restructuring included the purchase and application of updated Computer Assisted Design technology ("CAD"), known as Engineering Design Advantage. ROA at 26, 27. Prior to the purchase of the new system, DDG had been using an older version of CAD software, known as *VeriCAD*. ROA at 30. Mr. Flaharty was trained, familiar, and comfortable on the *VeriCAD* system, and never received an opportunity to train on the new software. ROA at 28, 30. DDG claims that Mr. Flaharty was ineligible for training because the new system had to be implemented "immediately," due to the time constraints of a large project for which DDG wanted to submit a bid. ROA at 28. After the loss of the project bid in November of 2020, DDG insisted that a reduction in force was the only necessary course of option, and that there "wasn't enough time to train anyone." *Id*. Engineering Design Advantage

was purchased on July 6, 2020, but was not made operational by DDG executives until the following December, approximately two weeks before Mr. Flaharty's termination. ROA at 28.

C. Untrustworthy Behavior by DDG

In August of 2020, DDG's Owner and President, Mr. Bennett, sought counsel from his attorney regarding DDG's obligations under the ADEA. ROA at 34. This meeting was to ensure that DDG was "follow[ing] the law in the event [DDG] had to make some changes." *Id.* However, Mr. Bennett claimed that the decision to implement a reduction in force did not arise until after DDG lost the bid for a large project in Dallas, which occurred in November of 2020. ROA at 30. DDG claimed this Dallas loss was due to lack of updated CAD software, and thus required the elimination of Mr. Flaharty's position and its replacement with someone "already trained." ROA at 28. Despite this reasoning, however, DDG allowed a four-month lapse between the acquisition of Engineering Design Advantage and the Dallas bid – meaning that the supposedly instrumental new software sat in DDG's possession unused until December 2020. ROA at 28.

DDG also claims that financial difficulties within the company necessitated the reduction in force that led to Mr. Flaharty's termination. ROA at 27, 28. These alleged financial troubles were noted at a January 2020 meeting with company executives. ROA at 27. During the year between the board meeting and Mr.

Flaharty's termination, DDG purchased the new Engineering Design Advantage system for $45,000, delivered end of year performance bonuses to three executives, paid for travel expenses to a design conference in Germany, and commenced remodeling on the Houston headquarters building. ROA at 27, 49.

D. Presence of Ageist Comments in the Workplace

Numerous executives at DDG displayed a pattern of using ageist comments about and toward Mr. Flaharty at work. DDG's Vice President and Chief Financial Officer would refer to Mr. Flaharty and his work group as "Leonardo da Vinci," and claim they completed their work with a "protractor and compass." ROA at 32, 33. In January of 2020, Vice President Stephen Appleman and Mr. Flaharty engaged in a heated exchange about the direction of the company, where Mr. Appleman told Mr. Flaharty that he represented the "old way of doing things" and that "decisions would be made by people who weren't around when protractors were invented." ROA at 39. Later that year, Mr. Appleman gave an interview to a local newspaper and was quoted as saying DDG wanted to be "perpetually young." *Id*. In December 2020, during the termination meeting, DDG's Owner and President told Mr. Flaharty that "everyone's 'time' comes eventually" and that this was Mr. Flaharty's "time." *Id*.

E. Procedural History

On March 1, 2021, Mr. Flaharty filed his original complaint alleging age discrimination in the United States District Court for the Northern District of Oklahoma. ROA at 8. On January 13, 2022, DDG filed a Motion for Summary Judgment, alleging that no genuine issue of material fact was present in the case at issue. ROA at 23. On July 27, 2022, the Honorable Judge Lynn N. Hughes ruled in favor of DDG, granting their Motion for Summary Judgment. ROA at 54. The Court found that Mr. Flaharty had met the burden of showing a prima facie case for age discrimination, and that DDG had offered a nondiscriminatory, legitimate reason for termination, but that Mr. Flaharty had failed to make a showing of genuine issue of material fact regarding the issue of pretext. *Id*. As a result, Mr. Flaharty filed a timely Notice of Appeal to this Court, regarding the District Court's final judgment, on August 19, 2022. ROA at 55.

SUMMARY OF THE ARGUMENT

The trial court committed reversible error in granting summary judgment in favor of DDG, denying Mr. Flaharty the ability for a jury to hear his claim. This is because the trial court erroneously granted summary judgment in favor of DDG, based on a finding that Mr. Flaharty had been unable to show the proffered termination reason was pretextual for discrimination. However, a genuine issue of material fact can be found regarding pretext, and thus summary judgment should have been denied.

The trial court abused its discretion by granting summary judgment, because Mr. Flaharty can show evidence of disparate treatment, untrustworthy behavior, and ageist comments, all of which have been found by courts in the past to constitute persuasive evidence of pretext from which a reasonable jury could infer discrimination.

Because DDG concealed their purchase of the new Engineering Design Advantage software, and failed to implement it for over four months after purchase, DDG denied Mr. Flaharty the opportunity to train on the new software. By refusing to allow Mr. Flaharty to train on the new CAD system, and then relying on his lack of training as an excuse for his constructive termination, DDG created disparate treatment between Mr. Flaharty and other similarly situated employees from which a reasonable jury could infer discriminatory intent. Because a reasonable jury could

infer discriminatory intent, a genuine issue of material fact exists regarding the issue of pretext, and prevents summary judgment from being granted.

Additionally, DDG displayed untrustworthy behavior by providing inconsistent reasons for Mr. Flaharty's termination. DDG claimed that financial difficulties led to a need for new software, which resulted in a reduction in force targeted at employees who lacked training in the new technology. However, DDG had not implemented the new software, nor trained any employees, until two weeks prior to Mr. Flaharty's termination, meaning the explanation that his lack of training was cause for termination is inconsistent with DDG's behavior.

DDG's inconsistencies regarding the circumstances of Mr. Flaharty's termination can be taken as evidence of untrustworthy behavior that could lead a reasonable juror to infer pretext.

Lastly, the presence of ageist comments directed at Mr. Flaharty paint a picture of a workplace ripe with age animus. Evidence of multiple, pervasive comments about Mr. Flaharty's age in relation to negative stereotypes, his productivity at work, and the implication that older workers have a "time" of expiration from employment show a consistent pattern of age-related animus among DDG's executives.

A reasonable juror could find that ageist comments made towards Mr. Flaharty were sufficient to allow an inference that DDG's given reason for

termination was pretextual. Because the ageist comments fall within an adequate nexus to Mr. Flaharty's termination, a reasonable jury could find them sufficient evidence of discriminatory intent, thus preventing summary judgment from being granted.

Because Mr. Flaharty has presented persuasive evidence that DDG's given reason for his termination was pretextual, the trial court erred by improperly granting summary judgment in the presence of a genuine issue of material fact.

ARGUMENT

The trial court committed reversible error in granting summary judgment in favor of DDG, denying Mr. Flaharty the ability for a jury to hear his claim. Under the standard for summary judgment, a court must construe all evidence and inferences in favor of the non-moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The burden on the non-moving party is light because the court should refrain from prematurely finding a case unfit for jury review if there are any genuine issues of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In keeping with this purpose, this Court should evaluate the case with all inferences and evidence in Mr. Flaharty's favor.

The trial court erroneously granted summary judgment in favor of DDG, based on a finding that Mr. Flaharty had been unable to show the proffered termination reason was pretextual for discrimination. However, a genuine issue of material fact can be found regarding pretext, and thus summary judgment should have been denied. The granting of summary judgment denied Mr. Flaharty the ability to have his claim decided on the merits. Even if this Court believes Mr. Flaharty's age-discrimination claim would not succeed at trial, it should still find that summary judgment was improperly granted because of the presence of a genuine issue of material fact that was appropriate for a factfinder's review.

The trial court abused its discretion in granting summary judgment for DDG, because Mr. Flaharty can show a genuine issue of material fact regarding the pretextual nature of the given termination reason.

The ADEA states that "[i]t shall be unlawful for an employer to [. . .] discharge any individual or otherwise discriminate against any individual [. . .] *because of* such individual's age[.]" 29 U.S.C.A. § 623(a)(1) (Westlaw through Pub. L. No. 117-177) (emphasis added). "Because of" in the context of the statute has been defined by the Supreme Court to mean the 'but for cause' for termination. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009). The Tenth Circuit Court of Appeals has further elaborated on their interpretation of this rule, holding that the 'but for' standard under *Gross* does not require age discrimination to be the *only* cause for termination, but must be a motivating factor that makes a contributory difference in the termination decision. *Jones v. Okla. City Pub. Schs.*, 617 F.3d 1273, 1277 (10th Cir. 2010).

In *McDonnell*, the Supreme Court held that a plaintiff may survive summary judgment on a discrimination claim by providing circumstantial, rather than direct, evidence. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973). This is because when the *McDonnell* test is met, a reasonable jury may infer age discrimination. *Id.* The three-part *McDonnell* test requires 1) the plaintiff to prove a prima facie case of unlawful discrimination, 2) the employer to identify a legitimate, nondiscriminatory reason for termination, and 3) the plaintiff to then prove the

proffered reason was pretextual. *Id.* Proving pretext entails showing either that the given, age-neutral reason was "unworthy of belief," or that the employer's true intent in terminating was discriminatory. *Pippin v. Burlington Res. Oil and Gas Co.*, 440 F.3d 1186, 1193 (10th Cir. 2006); *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1455 (10th Cir. 1994).

The District Court found that Mr. Flaharty has proved his prima facie case, and DDG has offered a nondiscriminatory reason for termination. ROA at 54. At step three, to successfully prove the employer's given reason for termination was pretextual, courts have allowed plaintiffs to present a variety of circumstantial evidence, including disparate treatment, untrustworthiness, and ageist comments, to show "weaknesses, implausibilities, inconsistencies, or contradictions" that "permi[t] an inference that the employer acted for discriminatory reasons." *Jaramillo v. Colo. Jud. Dep't*, 427 F.3d 1303, 1308 (10th Cir. 2005); *Bryant v. Farmers Ins. Exch.*, 423 F.3d 1114, 1125 (10th Cir. 2005); *see Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

In our case, the trial court abused its direction because evidence of disparate treatment in regard to training, untrustworthy behavior, and pervasive ageist comments in the workplace created enough genuine issue of material fact regarding pretext that a reasonable jury could infer discriminatory intent.

A. Mr. Flaharty was deliberately prevented from accessing training opportunities for DDG's newly implemented technology, resulting in a disparate treatment in relation to other similarly situated employees.

By refusing to allow Mr. Flaharty to train on the new CAD system, and then relying on his lack of training as an excuse for his constructive termination, DDG created disparate treatment between Mr. Flaharty and other similarly situated employees from which a reasonable jury could infer discriminatory intent.

The Supreme Court held, in *Hazen Paper Co. v. Biggins*, that a plaintiff can establish evidence of disparate treatment by showing the "employer simply treat[ed] some [workers] less favorably than others because of their [age]," and proof of an employer's discriminatory motive may be "inferred from the mere fact of differences in treatment" between similarly situated employees. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993). Thus, an employer's liability under a disparate treatment theory depends on whether the employee's age "actually motivated" the employment decision, because older employees must be evaluated "on their merits, and not their age." *Id.* at 610, 611. Accordingly, disparate treatment arguments "capture[] the essence" of Congress's motive in enacting the ADEA – concern over employers firing older workers based on inaccurate and stigmatizing stereotypes of declining productivity and competence. *Id.* at 610.

Furthermore, the Tenth Circuit has opined that plaintiffs in cases regarding reduction in force "only need to show that older employees were fired while younger

ones" who were similarly situated, were retained. *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1059 (10th Cir. 2020).

In *Woods v. Boeing Co.*, the plaintiff claimed that a younger co-worker with similar performance and evaluations had been treated more favorably, namely being retained for employment. *Woods v. Boeing Co.*, 355 Fed.Appx. 206, 209 (10th Cir. 2009). In *Woods*, the plaintiff was not selected for employment with a new company, after his previous employer sold the aircraft plant at which he worked. *Id.* at 207. Prior to his termination, the company was operating a "version 4" computer software, with a "version 5" being introduced in early 2005, and expected to be used by the new company after the mid-2005 takeover. *Id.* At the time the hiring decision was made, Woods' performance review indicated he possessed "limited [technical] skills." *Id.* at 209. Citing Woods' lack of familiarity with version 4 of the software, the employer claimed that the three retained employees, all of whom were younger than Woods, "were proficient with version 4 of the program and [were] more likely to adapt easily to version 5." *Id.* at 208. This was despite the employer admitting that "the plaintiff met the minimum qualifications for the position, which included making designs with the computer software." *Id.* at 210.

The Tenth Circuit found the implication that Woods could not learn the newest "version 5" was evidence "from which a jury could find that the 'limited skills'

justification was pretext," and enough to reverse the original grant of summary judgment in favor of the employer. *Id.* at 210.

In our case, as in *Woods*, Mr. Flaharty was assumed to be incapable of learning the new CAD software, despite his familiarity with and frequent use of the prior version, VeriCAD. *See id.* at 208-10; ROA at 28, 30, 36. This led DDG to terminate him for "lack of training," yet no other DDG employee at the time was trained in Engineering Design Advantage. ROA at 28, 32, 51. Every single DDG employee was similarly situated to Mr. Flaharty at the time of his termination – unaware of the expectation that training on a new software was required for retaining employment, and unfamiliar with the software itself. ROA at 28, 30. Despite being at the same disadvantage as his fellow workers, Mr. Flaharty received disparate treatment because of his age and DDG's belief in inaccurate stereotypes regarding older workers' abilities to learn new technology. ROA at 30.

By refusing to allow Mr. Flaharty to train on the new CAD system, and then relying on his lack of training as an excuse for his constructive termination, DDG created a disparate treatment between Mr. Flaharty and the other employees from which a reasonable jury could infer discriminatory intent. Because a reasonable jury could infer discriminatory intent, a genuine issue of material fact exists regarding the issue of pretext, and prevents summary judgment from being granted.

B. DDG displayed untrustworthy behavior by providing inconsistent reasons for Mr. Flaharty's termination.

DDG's inconsistencies regarding the circumstances of Mr. Flaharty's termination can be taken as evidence of untrustworthy behavior that could lead a reasonable juror to infer pretext.

Courts have considered untrustworthy behavior as evidence a jury could use to reasonably infer pretext in cases where an employer provides "shifting or inconsistent explanations for the challenged employment decision," or a "[p]ost-hoc fabrication" after the termination took place. *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1059 (10th Cir. 2020) (citing *Applebaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 579 (7th Cir. 2003)); *Plotke v. White*, 405 F.3d 1092, 1103 (10th Cir. 2005). These "after-the-fact justifications" have long been held as a sufficient method for establishing pretext, because a jury can "reasonably infer from the falsity of the explanation that the employer is [covering up a discriminatory purpose]." *Frappied*, 966 F.3d at 1059; *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000). Thus, the presence of untrustworthy behavior on the part of DDG would render summary judgment improper.

In *Frappied v. Affinity Gaming Black Hawk, LLC*, the Tenth Circuit found evidence of post-hoc justifications for termination and reversed the award of

summary judgment for the employer on an ADEA claim. *See Frappied*, 996 F.3d at 1038. In *Frappied*, each plaintiff was terminated and received a "Personnel Action Form" that indicated they failed to pass their "introductory period" at Affinity. *Id.* at 1059. According to Affinity, the introductory period was defined as the "first 90 days of continuous employment" and allowed for an employee review at the end of the period, which began shortly after Affinity took over business operations. *Id.* However, for each of the plaintiffs in *Frappied*, "none of the nondiscriminatory reasons [proffered by the employer] pertain[ed] to actions they took during the introductory period." *Id.* In fact, the court found that most of the conduct cited by Affinity as being the reason for termination occurred well before the introductory period, even "several years before." *Id.* at 1060. This was despite the plaintiffs being told their termination was as a result of failing to pass the ninety-day introductory period. *Id.*

In holding that a jury considering the above evidence could "reasonably believe that [the employer] lacked credibility," the court found that inconsistencies between reasons given for termination are enough to create a genuine issue of material fact regarding pretext. *Id.* at 1060, 1061.

In the present case, DDG offered inconsistent reasons for Mr. Flaharty's termination, claiming that financial difficulties led to a need for new software, which resulted in a reduction in force targeted at employees who lacked training in the new

technology. ROA at 27, 28, 30. At the time of his termination, DDG's Owner and President implied that Mr. Flaharty's termination was due to his lack of training on Engineering Design Advantage, because "there wasn't enough time to train anyone," and a "reduction in force was in order." ROA at 30. Despite only requiring a month of training and a month of practice to become proficient, DDG failed to implement the new software until four months after it was purchased, and only began training employees *after* Mr. Flaharty's termination. ROA at 28, 29, 37, 41, 51. As in *Frappied*, where the given reason for termination was inconsistent with employer behavior, DDG had several months during which they could have offered Mr. Flaharty, or *any* other employee, training on the new software. ROA at 28. DDG instead chose to conceal their purchase of Engineering Design Advantage from their workers, preventing employees from seeking out their own training opportunities in preparation for its implementation, and did not begin training retained employees until after Mr. Flaharty's termination. ROA at 28, 51. This is despite claiming that Mr. Flaharty's lack of familiarity with the new software was the cause for his job elimination. ROA at 28.

Additionally, DDG claims that Mr. Flaharty's termination occurred under the context of financial difficulties. ROA at 27, 28. While "the wisdom of a [reduction in force] is not for a court" to decide, the Tenth Circuit has also reasoned that "in ADEA cases a jury must make the factual determination of whether the reasons

stated by the employer are pretextual." *Furr v. Seagate Tech., Inc.*, 82 F.3d 980, 986 (10th Cir. 1996); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1427 (10th Cir. 1993). These alleged financial troubles were noted at a January 2020 meeting with company executives, almost a full year before Mr. Flaharty's termination. ROA at 27. During the year between the board meeting and Mr. Flaharty's termination, DDG purchased the new Engineering Design Advantage system for $45,000, delivered end of year performance bonuses to three executives, paid for travel expenses to a design conference in Germany, and commenced remodeling on their Houston headquarters building. ROA at 27, 49.

Because DDG's inconsistencies regarding the circumstances of Mr. Flaharty's termination can be taken as evidence of untrustworthy behavior which could lead a reasonable juror to infer discriminatory intent, summary judgment should not have been granted.

C. The presence of ageist comments directed towards Mr. Flaharty display a work environment riddled with age animus.

A reasonable juror could find that ageist comments made towards Mr. Flaharty were sufficient to allow an inference that DDG's given reason for termination was pretextual.

Courts have found ageist comments in the workplace to be evidence of discriminatory intent when they show age-related animus, and an adequate nexus to

the termination. *See Boyles v. AG Equip. Co.*, 506 F.Supp.2d 809 (N.D. Okla. 2007); *Wells v. Dynamic Rests. LLC*, 2006 WL 118397 (D. Colo. 2006). To show adequate nexus, the comments must be directed to or about the plaintiff in relation to their employment, the individual making the comments must be the person who instigated the termination or had a significant influence upon the decision maker, and must be closely related to the actual time of termination. *Boyles*, 506 F.Supp.2d at 817; *Wells*, 2006 WL 118397, at *11-12. Age-related comments are not considered to be discriminatory in cases where they are made as stray, isolated remarks, when they are ambiguous, or when used to describe the workforce as a whole. *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994); *Apsley v. Boeing Company*, 691 F.3d 1184, 1200 (10th Cir. 2012); *Cooper v. Fed. Rsrv. Bank of Richmond*, 467 U.S. 867, 875-76 (1984).

When directed at the plaintiff, made within an appropriate nexus to the employment action, and by the individual responsible for the employment action, courts have found ageist comments to be sufficient evidence of discriminatory intent to overcome a motion for summary judgment. This is because a reasonable jury could find ageist comments persuasive to show pretext for discrimination in a given reason for termination.

In *Boyles v. AG Equipment Co.*, the District Court for the Northern District of Oklahoma found that, during the hiring process, the manager stating "we need young

people," asking the plaintiff for his age, and responding with "that's too old to work in our skid department" was sufficient evidence to show directness towards the plaintiff and support an inference of pretext. 506 F.Supp.2d at 813. The Court went on to explain a timeframe that would constitute a "sufficient nexus" between ageist comments and the employment action at issue, finding that sixty days between the remark and termination was an appropriate length of time for a jury to infer "unlawful bias" as a motivating factor. *Id.* at 818-19.

Comparably, in *Wells v. Dynamic Restaurants LLC*, the District Court for the District of Colorado held that a manager making ageist comments toward a waitress like "hurry up, grandma," and "creak, creak, creak (as if her body was creaking)" exhibited enough age-related animus to find pretext. 2006 WL 118397, at *12. The Court noted that the comments in question were made "20-30 times" and were "unambiguously directed" towards the plaintiff. *Id.* In their holding, the Court reasoned that the "repetition and regularity" of the ageist comments, and their reference to the plaintiff's performance at work could allow a jury to reasonably infer "discriminatory animus." *Id.*

In Mr. Flaharty's case, the roadmap of comments similar to *Boyles* and *Wells* should allow this Court to make a similar conclusion about age-related animus shown towards Mr. Flaharty. *See Boyles*, 506 F.Supp.2d at 818-19; *Wells*, 2006 WL 118397 at *12. The Vice President of DDG and their Chief Financial Officer were

both noted for referring to Mr. Flaharty and his work group repeatedly as "Leonardo da Vinci" and referencing their work with the comment "protractor and compass." ROA at 32-33. Furthermore, an incident between Mr. Flaharty and the Vice President led to a heated exchange where the Vice President told Mr. Flaharty that he represented the "old way of doing things" and said "decisions would be made by people who weren't around when protractors were invented." ROA at 33, 39. Ultimately, minutes before his termination, the Owner and President of DDG told Mr. Flaharty that "everyone's 'time' comes eventually," and that this was his "time." ROA at 39.

These comments represent substantial evidence that a pattern of behavior showing age-related animus was present in the upper management at DDG and escalated with specificity towards Mr. Flaharty when he pushed back against the implementation of a new system and the movement of the company toward a more aesthetic direction. *Id.* Evidence shows that Mr. Flaharty, one of the oldest employees at the company, had been the target of repeated negative comments about his work preferences, capabilities, and mindset. *Id.*, ROA at 30. Perhaps most representative of DDG's attitude towards Mr. Flaharty's age was the Owner and President, Mr. Bennett's implication that older employees all have a "time" for expiration from their employment. ROA at 39-40. Mr. Bennett's comment during

Mr. Flaharty's constructive termination signifies the culmination of discriminatory comments made throughout Mr. Flaharty's employment with DDG. *Id.*

Considering that the court in *Boyles* determined that sixty days was an adequate nexus between the discriminatory statement and the employment action, this Court should find similarly that Mr. Bennett's comment made *at the time of termination* falls well within the adequate nexus standard. 506 F.Supp.2d at 818-19. Additionally, as in *Wells*, the frequent repetition of the "Leonardo" comments, their directness towards the plaintiff, and their reference to his work capabilities should be persuasive. 2006 WL 118397 at *12.

Because the ageist comments fall within an adequate nexus to Mr. Flaharty's termination, a reasonable jury could find them sufficient evidence of discriminatory intent, thus preventing summary judgment from being granted on the issue of pretext.

CONCLUSION

The trial court erred by granting summary judgment in favor of Digital Design Group because Mr. Flaharty has successfully raised a genuine issue of material fact regarding whether DDG's given reason for termination was pretextual for discrimination.